

IN THE CIRCUIT COURT OF  
THE ELEVENTH JUDICIAL CIRCUIT  
IN AND FOR DADE COUNTY, FLORIDA  
GENERAL JURISDICTION DIVISION

NORMA R. BROIN, et al.,  
Plaintiffs,

vs.

CASE NO. 91-49738  
CA 22

PHILIP MORRIS COMPANIES,  
INC., et al.,  
Defendants.

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TRIAL  
VOLUME 45

TRANSCRIPT OF PROCEEDINGS in the  
above-styled cause before the Honorable Robert Paul  
Kaye, at the Dade County Courthouse, 73 West Flagler  
Street, Miami, Florida, on Tuesday, July 15, 1997, at  
9:05 a.m.

APPEARANCES:

STANLEY M. ROSENBLATT, ESQ.

SUSAN ROSENBLATT, ESQ.

On behalf of the Plaintiffs

HUGH R. WHITING, ESQ.

JONES DAY REAVIS & POGUE

On behalf of R.J. Reynolds

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1 EDWARD A. MOSS, ESQ.  
ANDERSON MOSS SHEROUSE & PETROS  
2 On behalf of Brown & Williamson  
3 MICHAEL RUSS, ESQ.  
KING & SPALDING  
4 On behalf of Brown & Williamson  
5 DAVID L. ROSS, ESQ.  
GREENBERG TRAURIG, et al.  
6 On behalf of Lorillard  
7 DAVID HARDY, ESQ.  
and WALTER COFER, ESQ.  
8 SHOOK HARDY & BACON  
On behalf of Lorillard and Philip Morris  
9  
MARTINEZ & GUTIERREZ  
10 JOSE MARTINEZ, ESQ.  
On behalf of Philip Morris Companies  
11  
KELLY ANNE LUTHER, ESQ.  
12 CLARKE SILVERGLATE WILLIAMS & MONTGOMERY  
On behalf of Liggett and Brooke Groups  
13  
MARIE SANTACROCE, ESQ.  
14 MICHAEL FAY, ESQ.  
KASOWITZ BENSON TORRES & FRIEDMAN  
15 On behalf of Liggett and Brooke Groups  
16 JOSEPH R. MOODHE, ESQ.  
DEBEVOISE & PLIMPTON  
17 On behalf of The Council for Tobacco Research  
18 DAVID H. LICHTER, ESQ.  
KENNY NACHWALTER SEYMOUR ARNOLD CRITCHLOW &  
19 SPECTOR  
On behalf of The Council for Tobacco Research  
20  
21  
22  
23  
24  
25

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1 THE COURT: Be seated folks. Thank  
2 you. Good morning.

3 MS. ROSENBLATT: We have a couple very  
4 brief matters to bring up, Your Honor, before the  
5 jury comes in.

6 A situation occurred yesterday where we  
7 really feel that the plaintiffs have been -- not by  
8 the court but by what has occurred -- really, in  
9 effect, sandbagged.

10 When we left the courthouse, Mr. Donahue,  
11 who's general counsel for R.J. Reynolds, was having  
12 a press conference and we overheard part of it and  
13 unfortunately we saw snippets of it on various  
14 channels yesterday and references in media reports.

15 Now, yesterday afternoon, at the conclusion  
16 of court, I advised and showed defense counsel,  
17 which I'll now give Your Honor, a partial list from  
18 our data base which has 9,181 flight attendants who  
19 have written to us, contacted us, filed voluntary  
20 registrations that have serious diseases of  
21 emphysema, lung cancer, heart disease, pulmonary  
22 diseases, just a myriad of diseases caused from  
23 secondhand smoke.

24 Your Honor had ruled and we abided by that  
25 ruling that there would be no reference to this in

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1 opening statement; there would only be a generic  
2 reference to thousands of flight attendants  
3 nationwide.

4       Unbeknownst to us, and I have brought this  
5 up to defense counsel because we wanted to argue  
6 yesterday to make sure that there would be no  
7 reference in defendant's opening statement to any  
8 statement to the effect like in that peremptory  
9 instruction the defendants had provided the court,  
10 that, gee, we don't know if there are a hundred or  
11 two hundred, because we know there are over 10,000.  
12 We think the 60,000 is understated based on the  
13 responses we have gotten, but that's not for this  
14 trial. So, we have got an assurance from defense  
15 counsel not a word.

16       Unfortunately, they did indirectly that  
17 which they could not do directly. And I'm not  
18 suggesting defense counsel were involved in this.  
19 When Mr. Donahue started talking about less than one  
20 hundred flight attendants might be affected and  
21 that, unfortunately, was in the New York Times and  
22 that was on radio stations and T.V. interviews with  
23 Mr. Donahue and it's false. It's demonstrably  
24 false.

25       So, we have filed this partial data base --  
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1 this is just partial -- which is close to 10,000  
2 flight attendants because there are many, many, many  
3 serious illnesses. Every one of these has an  
4 illness, disease caused from secondhand smoke, and  
5 to suggest otherwise is trying to influence this  
6 jury.

7 And we would have brought this up yesterday.  
8 The media is being misled and more fundamentally,  
9 Your Honor said he's not issuing a gag order but  
10 everyone associated with this case should say, "No  
11 comment."

12 We have told that to our clients. The  
13 interviews with Patty and Norma that were on T.V.  
14 yesterday were filmed probably eight weeks ago when  
15 there were comments about a global settlement. They  
16 were not interviewed. There were no interviews with  
17 them.

18 And Mr. Donahue should not be permitted as a  
19 spokesperson for the tobacco industry to knock our  
20 opening statement, which he did, to talk about the  
21 merits of the case and to try to influence this  
22 jury. It's not fair and we are -- then we should be  
23 permitted to have interviews as well. It's just  
24 very upsetting to us.

25 So, that's the first point I wanted to bring

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1 up, and we also have a couple of other points about  
2 opening statement. If you would like to take these  
3 one at a time --

4 THE COURT: Let's talk about the first  
5 one first. By the way, is Mr. Donahue here in the  
6 audience?

7 MR. DONAHUE: Yes, sir, Your Honor.

8 THE COURT: Thank you, sir.

9 MR. MOSS: Your Honor, let me briefly  
10 respond to what Mr. Rosenblatt said was no big deal,  
11 which we agree for a moment. But the other day on  
12 Friday, Your Honor made a specific ruling. What you  
13 said was, because we filed a motion and our motion  
14 said the plaintiffs should not be permitted to refer  
15 to this magical number that they have kind of 60,000  
16 or even thousands and thousands, because as the  
17 court well knows there has been no evidence that has  
18 been allowed to be brought forth or received by the  
19 court, and we don't know the size of the class.

20 Your Honor heard argument and what Your  
21 Honor told both sides, because of the fact that  
22 there is no record, meaningful record where anyone  
23 can come in here and represent the size of this  
24 class is 60,000, thousands and thousands or a very  
25 small number, and the court solved that problem by

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1 saying, okay, if there's going to be any mention of  
2 a class size, then counsel needs to precede that  
3 number with -- you must say there's a potential  
4 class of thousands and thousands and the defendants  
5 you can say there is potentially a class of a very  
6 small number.

7         You said that because there is no evidence.  
8 The only evidence that we have when we brought  
9 forward was that of the initial 3500 voluntary  
10 registrations, we did a review and it showed about  
11 85 or 86 that claimed they had some disease. And of  
12 that 85 or 86 that claimed disease, six or seven  
13 were serious diseases. The rest were what we call  
14 people with sinusitis or sniffles.

15         After hearing all of that, then counsel  
16 said, well, we have got another 3500 or 4,000 that  
17 we haven't filed yet. We then looked at those and  
18 saw that there was an equal ratio, pretty much the  
19 same, of another 60 or 70 people and perhaps another  
20 three or four with serious diseases and the other  
21 group in the sniffles category.

22         The solution you said is you could refer to  
23 "potential" for that reason. Now, yesterday in  
24 Mr. Rosenblatt's opening argument, he didn't use the  
25 word to potential. He said, "I represent a class of

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1 thousands of flight attendants." And you know, so  
2 we talked about -- and the only thing that I know of  
3 that was mentioned by Mr. Donahue was out of the  
4 papers that we filed which indicated that the size  
5 of this class may, indeed, be very small and that  
6 there is no basis to make a representation that it  
7 is 60,000 or thousands and thousands. And that's  
8 still the situation and we intend to abide by Your  
9 Honor's ruling about mentioning only that this  
10 potentially is a small class and, indeed, from our  
11 research, that's what we have seen.

12 MR. HARDY: Could I be heard briefly?

13 THE COURT: Yes, sir.

14 MR. HARDY: I think the point on this  
15 class number is that since it's not an issue to be  
16 litigated in the first phase of trial and since  
17 defendants are not in the position to demonstrate  
18 through discovery which of the claims are, in fact,  
19 not valid claims, which people are, in fact,  
20 ex-smokers, which people don't have diseases, in  
21 fact, that this whole point is better left alone and  
22 not discussed.

23 That was the point we were trying to make  
24 all along. I won't dwell on that issue anymore  
25 since Mr. Moss has spoken to it. I wanted to

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1 address the latter part of Mr. Rosenblatt's comments  
2 about Mr. Donahue speaking to the press. We had  
3 considered raising the issue this morning ourselves  
4 because, for example, in the Miami Herald  
5 Mr. Rosenblatt yesterday was quoted as saying that,  
6 "Our objections in court were totally tactical. I  
7 was looking at the jury. I think they saw through  
8 it."

9 So, we have that interview with  
10 Mr. Rosenblatt. We know that Patty Young, one of  
11 the named plaintiffs, gave television interviews  
12 yesterday. You know, the problem goes on and on,  
13 and I don't know what to do about it. We had asked  
14 the court earlier for a gag order. We talked about  
15 this several times. Every time there's an article,  
16 it seems that somebody has talked.

17 THE COURT: All right.

18 MS. ROSENBLATT: I'd like to respond.  
19 I think there has been a total mischaracterization  
20 of the hearing before Your Honor several days ago.  
21 Your Honor certainly did not advise defense counsel  
22 that they could argue that there's a potentially  
23 small number.

24 Your Honor had indicated that the number  
25 that we would go by is thousands of flight

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1 attendants without more specificity. And I had a  
2 specific agreement, which is why I didn't file this  
3 yesterday, by defense counsel that there would be  
4 zero mention, not what Mr. Moss says about  
5 potentially a small number.

6 And Your Honor, if I could just clarify  
7 this, when defense counsel asked for voluntary  
8 registrations, we removed anything other than the  
9 voluntary registration which was the name and  
10 address of each flight attendant and we provided  
11 approximately 8,000.

12 We have an equal number of correspondence  
13 and letters about lung cancer and emphysema and  
14 heart disease and pulmonary diseases and other  
15 diseases which were not provided. Some 75 slipped  
16 through the process and had little notes that we  
17 didn't catch when we were having the copying done,  
18 and because of that, they are now taking the 75 or  
19 85 instead of the 10,000 and completely distorting  
20 that as if that has now been elevated to evidence.

21 We have of record 9,181 and several thousand  
22 more in our office of serious diseases from  
23 secondhand smoke. We are not asking and we did not  
24 dwell on that in opening statement. But to suggest  
25 that there's any evidence that it is potentially a

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1 small number, is just totally false and that wasn't  
2 Your Honor's ruling.

3         You just told us stay away from it and you  
4 reminded defense counsel that the questionnaire and  
5 the definition of the class and all of the  
6 questioning and instructions from the court is that  
7 this is a nationwide class of thousands of flight  
8 attendants.

9         I mean, if necessary, I will file of record  
10 today and have our staff work on compiling all of  
11 the diseases and, you know, then we have an  
12 evidentiary record of thousands and thousands of  
13 diseases. I think we have it here, and I just did  
14 not want to file absent class members. This doesn't  
15 include class representatives. And we have got a  
16 room full of boxes of more of this.

17         But you know, I don't want a distortion that  
18 the jury could somehow think we are talking about a  
19 few hundred people. We are talking probably about a  
20 hundred thousand flight attendants. It's just not  
21 accurate. And you know, I think that defense  
22 counsel should not be permitted to in any way argue,  
23 since it's not based on any evidence in this case,  
24 that potentially could be a small number, because I  
25 think it's improper, prejudicial argument.

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1           And I know Stanley has a comment to make  
2 about his quote in the Miami Herald.

3           MR. ROSENBLATT: My comment to the  
4 Miami Herald was made in self defense. I was asked  
5 about what Donahue had said, which is precisely  
6 consistent with his interviews to the media that  
7 Rosenblatt knows better; all the objections were  
8 well-taken; he's a seasoned lawyer; he knew what he  
9 was doing was wrong.

10          So, I said the objections were tactical.  
11 Many judges have different views about it. I didn't  
12 know that their objections were not well-taken. And  
13 Mr. Donahue is apparently the designated circuit  
14 rider of the tobacco industry. They are doing  
15 indirectly what Your Honor has not permitted them to  
16 do directly.

17          He was in Jacksonville. Now he's in Miami  
18 taking no active role in the defense of the case but  
19 talking to the media at every opportunity, something  
20 that Norma Broin and we are not doing and it's not  
21 right.

22           THE COURT: All right.

23           MR. WHITING: Your Honor, may I be  
24 heard?

25           THE COURT: Anybody else besides this

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1 one so I know where we are going? Is this the last  
2 of it?

3 All right. Go ahead. I just want to know  
4 if there's going to be anymore input.

5 MR. WHITING: I think that what is  
6 occurring this morning is for the benefit of the  
7 media. The instructions that the court gave with  
8 respect to the size of the class and the motion that  
9 was argued have been and will be honored by defense  
10 counsel and, indeed, we confirmed those undertakings  
11 to plaintiff's counsel yesterday.

12 I wasn't present for any interview by  
13 anybody yesterday, and I won't attempt to say what  
14 was said or not said. What I will say is that  
15 Mr. Martinez argued here in open court loudly and  
16 vociferously a motion which we have filed in writing  
17 and open court and it's available to all of the  
18 media which sets forth clearly defense's position  
19 regarding what the potential size of this class is.

20 What plaintiffs have served this morning is  
21 a list of names. There is no evidence with it.  
22 There is no substantiation with it. And as  
23 Mr. Hardy said, it isn't an issue that's for this  
24 case, and I simply want the record to reflect what  
25 the public record is, which is what we argued last

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1 week before this case and what the media saw last  
2 week before this court.

3 Thank you, Your Honor.

4 THE COURT: I'd like to get some  
5 indication from the defense what you intend to say  
6 in your opening statement regarding the size of the  
7 class.

8 MR. HARDY: Nothing, Your Honor.

9 MR. WHITING: Nothing, Your Honor.

10 MR. FAY: Nothing, Your Honor.

11 THE COURT: So be it. All right. Now,  
12 at this point, I thought I had issued some sort of a  
13 directive -- we'll call it that -- that parties to  
14 this action and their representatives should not be  
15 making statements to the media. I thought we  
16 understood that because it came up some time ago in  
17 which it was mentioned that Mr. Donahue was making  
18 statements and so forth, and I said it's time to put  
19 an end to that.

20 I really would sincerely hope that you would  
21 follow that directive. If you want me to put it  
22 into a gag order, then I'm going to have to do it  
23 because you are obviously not following the court's  
24 ruling.

25 So, I don't want any comment made to the

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1 media by anybody who's part of this case, even if  
2 you are representing a party or are a party.  
3 Mr. Donahue is not being here in an active role, as  
4 I understand it. But as a representative or part of  
5 one of the defendant's interests, that would include  
6 him.

7 I don't want this jury to be infected by any  
8 outside media source of any sort of information,  
9 albeit they are under strict orders of the court not  
10 to watch T.V., read newspapers and so forth. But we  
11 all know it's almost impossible to prevent that  
12 unless we lock them up, and I don't want to do that.

13 So, in order to avoid any mishap, it would  
14 be a lot better if the comment to the media would be  
15 "No comment" and that way we don't have to worry  
16 about somebody hearing something they shouldn't  
17 hear.

18 I hope you will follow that rule. All  
19 right?

20 MR. MOSS: Judge, in furtherance of  
21 what you just indicated about the jurors and in view  
22 of the press that was in this morning's paper and  
23 T.V. coverage that was given last night as well as  
24 this morning, I don't mean to make an issue of it or  
25 expect any individual inquiry but confirm with the

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1 jurors that, since being here, they have not read or  
2 heard anything about this case.

3 MR. ROSENBLATT: We don't want that  
4 done.

5 THE COURT: That's a Pandora's box.

6 MR. MOSS: But it may be, Your Honor,  
7 but I think to not make the inquiry certainly --

8 THE COURT: We are going to go through  
9 this process daily, apparently, because of the kind  
10 of coverage this case is getting.

11 MR. MOSS: But if it takes a daily --  
12 I'm not suggesting it does or doesn't.

13 THE COURT: It's probably more  
14 appropriate than not, although it's dangerous. All  
15 right.

16 MR. ROSENBLATT: Our position, Judge,  
17 is that to make the inquiry trivializes your very  
18 strong statement.

19 THE COURT: I'm sure they will get the  
20 message loud and clear. I tried to make it as loud  
21 and clear yesterday as I possibly can.

22 MR. ROSENBLATT: You did. But to do it  
23 every day says, well, maybe you didn't really mean  
24 it.

25 THE COURT: Maybe they weren't

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1 listening.

2 MR. ROSENBLATT: We shouldn't assume  
3 that. We should assume they are.

4 THE COURT: Anything else?

5 MS. ROSENBLATT: Yes.

6 THE COURT: More surprises?

7 MS. ROSENBLATT: Well, we were faxed to  
8 us last night a number of charts demonstrative  
9 evidence that R.J. Reynolds intends to use and I  
10 assume -- I don't know if the charts are here.

11 MR. HARDY: They are not. Those are  
12 mine.

13 MS. ROSENBLATT: As far as I know,  
14 there's one that we were provided from Mr. Hardy,  
15 Philip Morris, a time line, and we have no problem  
16 about that.

17 MR. HARDY: I told you about others.

18 MS. ROSENBLATT: We wanted to see them  
19 and we haven't.

20 MR. HARDY: They are the ones I  
21 described to Stanley, the warning labels blown up,  
22 the Frank Statement, and the list of four points I  
23 was making --

24 MS. ROSENBLATT: I think it would be  
25 helpful, Your Honor, as I argue these, if Reynolds'

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1 counsel could show you their blowups of what they  
2 intend to use so I can refer to it, because we do  
3 object very strongly as to that.

4 And as a preliminary comment, Your Honor,  
5 based on what has been faxed to us, it appears that  
6 the defendants may be taking the position -- and we  
7 can object as it comes up in opening statement --  
8 that it's not our role in our opening statement to  
9 not or to comment upon and it would be  
10 inappropriate, but defense experts -- 35 of their  
11 experts are Ph.D.'s, not medical doctors.

12 There's a long line of case law in Florida  
13 that Ph.D.'s cannot testify as to causation or lack  
14 thereof. We would object, and we would like to know  
15 if the defendants plan to suggest that any of these  
16 Ph.D.'s will be talking about whether secondhand  
17 smoke causes or doesn't cause.

18 They can talk about the research that they  
19 have done, if they have done any, but certainly not  
20 as to the ultimate issue of causation which, under  
21 Florida law, there must be a medical degree to  
22 connect a particular disease with a cause.

23 So, I just wanted to mention that because  
24 some of these blowups seem to suggest that that may  
25 occur.

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1           Where are the blowups?

2           MR. WHITING: Your Honor, may I  
3 approach?

4           THE COURT: Yes, sir.

5           MR. WHITING: If I can hand you a small  
6 set of these.

7           MS. ROSENBLATT: Our objection to  
8 these -- and actually, the objection is fairly  
9 consistent as to all of these -- is that these  
10 purport to be evidence. They are argumentative in  
11 nature. They purport to be some type of official  
12 graph and they are inappropriate for an opening  
13 statement.

14           Arguably, if a witness had prepared it, we  
15 would object that it is inappropriate even for a  
16 witness to use in connection with this testimony.  
17 But we feel these are totally inappropriate for  
18 opening statement because they appear to be  
19 evidentiary in nature.

20           They are very professionally done, like  
21 yearly comparative ETS exposures with living with a  
22 smoker, office, flight attendants, and then they  
23 have all types of numbers and graphs, and these are  
24 arguments. These are arguments that are being made  
25 that are being put in a very glossy color-type

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1 presentation which we feel would not even be  
2 appropriate for closing argument, let alone opening  
3 statement.

4 I think it would mislead the jury. Like  
5 trace levels, there's two Sweet'N Low, an  
6 olympic-size pool, one Sweet'N Low, the Orange Bowl  
7 Stadium in a color photograph and then multiple EPA  
8 analyses, a whole chart about this, you know, it  
9 goes on and on. It's the same objections to all of  
10 them.

11 I think it violates Your Honor's earlier  
12 ruling that if there is a blowup of a particular  
13 document which is in evidence, fine. If there's a  
14 couple of points that counsel could make on a  
15 blackboard -- but these go way beyond that.

16 They are diagrams, charts, and they purport  
17 to be evidence, and I think it would be misleading  
18 and prejudicial to the plaintiffs if that were  
19 permitted on opening statement.

20 THE COURT: Pull out, if you would,  
21 what it was that you used yesterday, the Frank  
22 Statement.

23 MS. ROSENBLATT: The Frank Statement,  
24 and there were a few public statements from the  
25 tobacco industry that are in evidence that were --

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1 MR. MOSS: There's nothing in evidence.

2 MS. ROSENBLATT: That are listed as  
3 exhibits that were not objected to. These are  
4 basically statements in the early 1980s and this is  
5 in the seventies from the Tobacco Institute.

6 These are actual blowups of matters that  
7 will be in evidence in the case, and that was it.  
8 This is the first page of a Brown & Williamson  
9 Employee Handbook that discusses Jesse Steinfeld,  
10 public smoking, where there was no objection.

11 THE COURT: Those matters you made  
12 reference to have been matters which have been  
13 agreed to as exhibits without objection?

14 MS. ROSENBLATT: Yes. They were not  
15 objected to in opening statement. They were shown  
16 to defense counsel. There was no objection to using  
17 them.

18 THE COURT: No objection to using them  
19 in opening.

20 MS. ROSENBLATT: We showed them in  
21 advance; there was nothing in this category at all.

22 THE COURT: Okay. Yes, sir?

23 MR. WHITING: Your Honor, each of the  
24 demonstrative charts or lists that I have planned to  
25 use in my opening which we faxed to the plaintiffs

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1 yesterday reflects nothing more than what the  
2 evidence indicates will be.

3           In each of these I have either listed a  
4 series of points which will be points of evidence  
5 that will be reflected in my opening statement and  
6 which I will say will be the evidence because it  
7 will be from our experts, or they are fundamental  
8 principles of the toxicology or they are examples of  
9 the way our experts would explain complicated things  
10 such as a nanogram.

11           I asked an expert how to create a visual  
12 impression of that, and he told me how he would  
13 describe it for the jury and that's what that  
14 picture shows and that's what the expert will  
15 testify to.

16           The others are also examples of what the  
17 testimony will be about things like cigarette  
18 equivalents and comparative exposures. There are  
19 equivalents that the experts will testify to and  
20 there are comparative exposures of what a flight  
21 attendant gets versus what someone in a workplace or  
22 someone in a home gets.

23           There are examples of other things such as  
24 the fact that we all live around carcinogens in  
25 water and air that the experts will testify to. And

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1 then there are a series of charts that deal with  
2 what Mr. Rosenblatt characterizes are nitpicking  
3 that is trying to explain difficult subjects of  
4 epidemiology, and they explain principles of  
5 epidemiology and principles of causation.

6 And then there's a listing of the criticisms  
7 that the experts will testify to with respect to the  
8 EPA report.

9 So, in each case they reflect evidence.  
10 They are not being offered in evidence. They are  
11 just demonstrative or illustrative of what the  
12 evidence will be. I don't see any basis for not  
13 using them in the opening. They are not  
14 argumentative. They are not anything other than  
15 precisely what the witnesses in this case will  
16 testify to, and they will facilitate being able to  
17 communicate with the jury and save me the time of  
18 trying to write the lists or draw the pictures or do  
19 the examples on a board, which I would otherwise do.

20 THE COURT: Well, I don't agree with  
21 you that they are not argumentative. I think they  
22 are. It wasn't really my intent to get into this  
23 kind of a thing with demonstrative matters on  
24 opening statement. I don't think it belongs there.

25 If the experts want to use this in their

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1 testimony, that's fine. They can at least attempt  
2 to do so, and I'll rule on it at that point. But I  
3 don't think it really belongs in opening.

4 The other things that counsel used for the  
5 plaintiff, if there wasn't any objection, so be it.  
6 That's one thing. But there are objections to these  
7 and I agree with the objections at this point. I  
8 think they are designed as argumentative, so I'll  
9 sustain the objection as to these in opening  
10 statement.

11 MR. WHITING: Your Honor, may I  
12 understand your ruling? I would intend, then, to  
13 try to --

14 THE COURT: I don't want you to draw  
15 them either because it depends on what you put down.  
16 My original idea was you wanted a chronological  
17 explanation, you could write down the dates so that  
18 everyone could follow the chronology. But the way  
19 you have got this done here, this is something which  
20 tends to, as far as I'm concerned, indicate a theory  
21 and an argument as to the authenticity of what it is  
22 you are talking about, and I'd rather leave that for  
23 evidence at trial.

24 MR. MOSS: Could I have one moment to  
25 talk to Mr. Whiting?

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1 THE COURT: Go ahead.

2 MR. WHITING: Your Honor, obviously I  
3 don't agree that they are argumentative, but the  
4 point is that what my opening statement will deal  
5 with, quite frankly, are the details of scientific  
6 issues such as dose response, such as relative risk,  
7 such as statistical significance. And what many of  
8 those exhibits are are ways to explain exactly the  
9 way the evidence will explain what those concepts  
10 are. They are conceptual exhibits.

11 My opening will also talk about very  
12 fundamental points like dose and how important dose  
13 is in this case and make comparisons of dose, and  
14 that's exactly what the evidence from these experts  
15 will show.

16 THE COURT: Well, your point is  
17 understood by the court. My ruling still stands.  
18 Save it for the trial. You want to file this?

19 Do you need these back?

20 MR. WHITING: No. Let's file it for  
21 the record, Your Honor.

22 Just so I understand, I don't want to get  
23 cross-wise in this opening, Your Honor, but I want  
24 to understand. You are telling me --

25 THE COURT: You can put down a note or

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1 two or something, but I don't want you to go into  
2 this reproduction of any of these documents on there  
3 because I really truly believe that it is better to  
4 use in trial after the testimony and by the person  
5 who's testifying.

6 This is something created by you, the  
7 lawyer.

8 MR. WHITING: Actually, no, it's  
9 created by experts.

10 THE COURT: Well, if they created it,  
11 let them come in and testify about it.

12 MR. WHITING: But that --

13 THE COURT: I don't want to argue the  
14 point with you anymore, counsel. I have ruled.

15 MR. WHITING: Thank you, Your Honor.

16 MR. COFER: One more housekeeping  
17 matter, Your Honor. You had ruled each side is  
18 provided 48 hours' notice to the other side of the  
19 witnesses they would call and exhibits they would  
20 use, and plaintiffs have told us the witnesses they  
21 were going to call this week.

22 We are already only into day two and they  
23 have missed exhibits both days, so we need to know  
24 what exhibits their witnesses are going to use and  
25 rely on 48 hours in advance, consistent with Your

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1 Honor's ruling, so we can prepare to examine.

2 They are going to call Dr. Richmond  
3 tomorrow, and Mrs. Rosenblatt has told me they are  
4 going to use the '79 Surgeon General's report, the  
5 '86 Surgeon General's report and some generally  
6 described Tobacco Institute documents. I understand  
7 I'll get copies of those documents today.

8 Now, it's not 48 hours in advance, but I'll  
9 do my best. With respect to the other witnesses,  
10 however, that they are going to call on Thursday and  
11 Friday, we really must insist that they make every  
12 effort to comply with your court's order and provide  
13 us with exhibits sufficiently in advance so we can  
14 prepare and present the evidence to the jury.

15 THE COURT: I thought we had agreed on  
16 that.

17 MS. ROSENBLATT: We have them. We just  
18 had them copied by Icon. Robin just brought them  
19 in. I advised counsel yesterday of specifically  
20 what they were, which are the Surgeon General  
21 reports and all of the publications similar to the  
22 ones we had in opening statement by the Tobacco  
23 Institute, which are on the exhibit list and which  
24 they have a copy of, and the R.J. Reynolds and  
25 Philip Morris pronouncements, and we have actually

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1 copies here to show them which we made an extra copy  
2 of our exhibits.

3 THE COURT: He'll work through those.

4 MR. COFER: That's with respect to  
5 Dr. Richmond.

6 THE COURT: Right. And anything  
7 thereafter, the 48-hour rule applies.

8 MS. ROSENBLATT: Yes, absolutely.

9 MR. MOSS: One last thing having to do  
10 with 48-hour rule. This morning we got a  
11 hand-delivery from Mr. Rosenblatt where he says that  
12 in the event the court wants to have evidence today,  
13 that they intend to read excerpts from the  
14 deposition of Thomas Sandefur who, if you recall,  
15 was Brown & Williamson's CEO who is deceased who was  
16 deposed back in '93, I think, and for the first time  
17 we received a page and line designation this  
18 morning.

19 We can't respond to that this afternoon. We  
20 have got people to work on it. But there is a  
21 reason for the 48-hour rule. We talked about that  
22 months ago and Your Honor said yes. In fact, I had  
23 asked for, I think, a 72-hour rule, and Your Honor  
24 said no, let's cut it down to 48 hours, and that's  
25 when you came up with both the designation of the

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1 witness who it is going to be plus the exhibits they  
2 are going to use.

3 And this process can't work unless we all  
4 abide by it, and getting a notice this morning with  
5 the designations just simply is inconsistent.

6 THE COURT: It may be because of the  
7 situation that occurred yesterday in that they ended  
8 sooner than we had anticipated. I anticipated you  
9 folks might end sooner than we anticipated and I  
10 didn't want to get stuck with nothing to do in an  
11 afternoon when we could put something on.

12 MR. MOSS: We addressed that yesterday  
13 and talked about if that was done, we would then do  
14 one of the witness designations that they had  
15 already given us.

16 MR. COFER: And Your Honor may recall  
17 yesterday in chambers plaintiffs identified James  
18 Morgan, CEO of Philip Morris, Incorporated, as the  
19 first CEO whose deposition they would like to show.  
20 Last night I faxed to plaintiff's counsel and they  
21 received our objections to their designation.

22 I have offered to sit down over lunch, see  
23 what we could work through. We can limit the ones  
24 that we need to have the court address and we are  
25 prepared to go forward either with argument this

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1 afternoon or if possible show the videotape,  
2 assuming we could reach an agreement.

3 THE COURT: I was under the impression  
4 Mr. Morgan's testimony --

5 MR. ROSENBLATT: For example, Judge,  
6 late last night -- and I thought I was doing them a  
7 favor when I gave them the designations of Sandefur,  
8 which I figured would be relatively simple because  
9 that's simply reading from a deposition; we don't  
10 have to get the video operator here or anything like  
11 that.

12 Now, not only have I given them 48 hours'  
13 notice, I have told them that our plan is tomorrow,  
14 Julius Richmond; Thursday Dr. Ronald Davis; and I  
15 have gone through Friday, Michael Siegel. The  
16 problem is many times I don't have 48 hours' notice  
17 of the documents I intend to use until I sit down  
18 with the witness.

19 We are going to do the best we can. And if  
20 I can give them, for example, next Monday -- talk  
21 about 48 hours -- I'm telling them it's my intention  
22 to call Mr. LeBow so they have all the notice in the  
23 world.

24 With respect to documents, you know, we'll  
25 do absolutely the best we can. Looking at all their

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1 objections to Morgan, it was obvious to me this was  
2 going to require lengthy argument.

3 THE COURT: I'll tell you what. Rather  
4 than not do anything, we can take a lot of non-jury  
5 matters up if we need to in that period of time and  
6 that will satisfy the court's time as far as that's  
7 concerned, and we could get rid of a lot of things  
8 and so we can always run that route.

9 MR. ROSENBLATT: Because obviously,  
10 from our standpoint, generally speaking, and it will  
11 depend on what we see, the modus operandi is with  
12 respect to cross examination and how long it takes,  
13 I mean, right now we are basically planning on one  
14 live witness a day. And then, if the witness for  
15 some reason finishes earlier and don't spill over  
16 into the second day, what we're going to do with  
17 respect to backup is depositions or videos to fill  
18 up the time.

19 THE COURT: I anticipate we'll have a  
20 lot to talk about that does not require the presence  
21 of the jury. In any event, I'd like to get that out  
22 of the way as early on as we can. So, maybe we can  
23 do that in this group here, this opening statement  
24 problem that we had, because of the time sequence  
25 and because of them not getting sufficient time to

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1 go through all of the objections. We'll work that  
2 out.

3 MR. COFER: What I suggest, Your Honor,  
4 is that I'll be happy to sit down at the lunch hour,  
5 work through the other --

6 THE COURT: Right. And then we can  
7 handle it. That's no real problem. I have bigger  
8 problems, I'm sure.

9 Okay. Let's get the jury.

10 THE BAILIFF: Bringing in the jury.

11 Jurors entering the courtroom.

12 (Thereupon, the jury entered the courtroom.)

13 THE COURT: All right. Have a seat,  
14 folks. Thank you. Okay. If you folks will come in  
15 by the numbers, it will be a lot simpler -- you  
16 won't be stepping on anybody's toes -- starting with  
17 the number one juror, just look who your neighbor  
18 is, line up, and then you can march in without any  
19 problem.

20 All right. During the recess since  
21 yesterday, has anybody here seen or watched anything  
22 on television, newspapers, magazines or anything  
23 else about this case?

24 Okay. I can't express to you the importance  
25 of following my ruling and my order not to watch

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1 anything, not to read anything, not to listen to  
2 anything that may regard this case.

3 Yes, sir? Your number is what?

4 JUROR NO. 63: 63.

5 THE COURT: Yes, sir.

6 JUROR NO. 63: I called my job.

7 THE COURT: I can't hear you.

8 JUROR NO. 63: I called my job the

9 other day to let my boss know that I did receive the  
10 letter, and he was just telling me that one of the  
11 supervisors there has -- he's one of the people  
12 involved in the case here.

13 THE COURT: One of who?

14 JUROR NO. 63: My supervisor.

15 THE COURT: Your supervisor is involved  
16 in the case?

17 JUROR NO. 63: Yes. He's one of, I  
18 guess, the claimers, the people that have the claim  
19 against the tobacco company.

20 THE COURT: He does personally or a  
21 member of his family or what?

22 JUROR NO. 63: No. One of the  
23 supervisors, I was talking to one of the supervisors  
24 about the letter that I was supposed to bring. I  
25 told him I was bringing it today.

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1 THE COURT: And he said?  
2 JUROR NO. 63: He said, you know,  
3 Jameel (phonetic), he's a part of the -- he's one of  
4 the people that --  
5 MR. MOSS: Judge, I'm not sure what is  
6 going to happen, but I think we ought to do it  
7 out --  
8 THE COURT: I don't think it's  
9 necessary.  
10 Mr. Jameel, is that the name?  
11 JUROR NO. 63: Yes.  
12 THE COURT: Has a member of his  
13 family --  
14 JUROR NO. 63: No. He has a claim  
15 against the tobacco company.  
16 THE COURT: In this same case or a  
17 different case?  
18 JUROR NO. 63: I think it's the same  
19 case.  
20 THE COURT: Was he ever a flight  
21 attendant?  
22 JUROR NO. 63: He worked for Pan Am.  
23 THE COURT: As a flight attendant?  
24 JUROR NO. 63: I don't know what he  
25 did.

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1 THE COURT: Assuming that he was,  
2 assuming that he was, does that make any difference  
3 to you?

4 JUROR NO. 63: No.

5 THE COURT: Okay. Is that going to  
6 affect your decision in this case?

7 JUROR NO. 63: No, sir.

8 THE COURT: You are going to keep it  
9 outside this case?

10 JUROR NO. 63: Yes, sir.

11 THE COURT: All right.

12 JUROR NO. 63: Just wanted to bring it  
13 up.

14 THE COURT: All right.

15 Yesterday you heard from the plaintiffs in  
16 their opening statement. Today is the time for the  
17 defense to give you their opening statement. I  
18 would like to know, if I can, how many of you folks  
19 are going to address the jury.

20 MR. HARDY: Your Honor, I believe that  
21 opening statements will be delivered by me, by Hugh  
22 Whiting, by Michael Fay, is that right?

23 MR. FAY: Yes, sir.

24 MR. HARDY: And I believe that that is  
25 all.

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1 THE COURT: All right.

2 MR. HARDY: There's a possibility of a  
3 very brief comment by Mr. Moss, so there would be at  
4 the most four people speaking.

5 THE COURT: No overlap?

6 MR. HARDY: No overlap.

7 THE COURT: Go ahead, sir.

8 MR. HARDY: May it please the court,  
9 counsel, Ms. Young and Ms. Broin and ladies and  
10 gentlemen of the jury, my name is David Hardy, and I  
11 think I'm going to do the last round of  
12 introductions.

13 You have had a good number of introductions,  
14 but I have to do this last round of the defense  
15 counsel and there are, indeed, as you have observed,  
16 a good number of defense lawyers here because the  
17 plaintiffs sued a good number of companies. And of  
18 course, everybody is entitled to an attorney.

19 So, just one more time I want to introduce  
20 you to the people -- I'll restrict this to the  
21 people pretty much who may be presenting some of the  
22 evidence so you will understand who they are and  
23 realize, of course, that they can't talk to you in  
24 the halls while the trial is continuing as the court  
25 has told you or will tell you.

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1 David Ross -- would you stand up, please?  
2 David Ross represents The Tobacco Institute and he  
3 also represents Lorillard. He's from here in Miami.  
4 I represent Lorillard and Philip Morris, so I'm  
5 working with Mr. Ross.

6 Ed Moss also from Miami represents Brown &  
7 Williamson. Michael Russ there behind the bar also  
8 represents Brown & Williamson. So, we have Ross and  
9 Moss and Russ.

10 We'll keep going. Hugh Whiting represents  
11 R.J. Reynolds. Jeffrey Furr represents R.J.  
12 Reynolds.

13 Jose Martinez is working with me  
14 representing Lorillard and Philip Morris. My  
15 partner, Walter Cofer, will be putting on some of  
16 the evidence. Mr. Cofer works in Missouri with me  
17 and we represent, as I said, Lorillard and Philip  
18 Morris.

19 Joe Moodhe represents CTR. That's that  
20 organization Mr. Rosenblatt was talking about  
21 yesterday.

22 Marie Santacrose, Michael Fay and Kelly  
23 Luther represent Liggett.

24 And I'll put your mind at ease at the very  
25 beginning; you are not going to hear from all those

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1 people. We have tried to cooperate at least to the  
2 extent where you won't have to listen to all the  
3 lawyers give opening statements, so there won't be a  
4 lot of unnecessary overlap.

5 Now, as you might expect when somebody files  
6 a lawsuit or gets sued, they are entitled to be here  
7 in court, just as Ms. Young and Ms. Broin are here.  
8 And we are entitled to have somebody here, but you  
9 can't bring a company into the courtroom, so what  
10 the law says, basically, is you can have a  
11 representative come in and we have some of those  
12 people, not necessarily people who we would put on  
13 the witness stand to talk about science, but  
14 employees who are here interested in the case to  
15 watch the trial.

16 I know of four of those, and I want to  
17 introduce you to those too, for the same reason,  
18 because the court has told you or will tell you that  
19 the lawyers and the parties are not supposed to talk  
20 to you during this trial. And I don't want -- when  
21 you see these people, I want you to realize who they  
22 are so you won't think they are being rude if they  
23 don't speak.

24 Dan Donahue is here, an employee of R.J.  
25 Reynolds; Phillip Scourfield for Brown & Williamson;

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1 John Mulderick for Philip Morris; and James Wilson  
2 for Lorillard. And those people will be here during  
3 the trial.

4 And I want to add my thanks and our thanks  
5 for the defendants and the same thing that  
6 Mr. Rosenblatt said about this yesterday, I think  
7 that the court and all of the attorneys appreciate  
8 the fact that you are doing your duty serving as  
9 jurors. It is a duty, but there's easy duty and  
10 there's medium duty and there's tough duty, and you  
11 know from the jury selection process that this is  
12 tough duty, so we appreciate your being willing to  
13 do it.

14 In this country, we don't have trial by  
15 media or trial by newspaper; we have trial by jury  
16 with rules about evidence and what comes in and what  
17 doesn't come in. If the system is going to work,  
18 somebody has to be willing to do it. We appreciate  
19 the fact that you are willing.

20 Now, Mr. Cofer and I, Walter Cofer and I,  
21 represent, as I said, Lorillard and Philip Morris.  
22 Lorillard is, I think, perhaps the oldest of the  
23 tobacco companies, going back to the late 1700s  
24 founded by Pierre Lorillard.

25 That company makes Kent cigarettes and True  
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1 cigarettes and Newports. And Philip Morris makes a  
2 variety of food products. They make Miller beer and  
3 they make Velveeta cheese and they make Maxwell  
4 House coffee, and they make the number one selling  
5 cigarette in the United States and the world:  
6 Marlboro.

7 Brown & Williamson, among others, makes Kool  
8 and Raleigh. And R.J. Reynolds makes Camel and  
9 Salem and Winston.

10 And those companies are all very proud of  
11 their cigarettes and they would like to sell more of  
12 them. They would like to take market share away  
13 from each other. Brown & Williamson would like to  
14 get the Salem smoker from R.J. Reynolds to switch  
15 over to Kool, and Lorillard would like to get the  
16 Kool smokers --

17 MR. ROSENBLATT: Your Honor, objection.  
18 This is not appropriate for opening.

19 THE COURT: Sustain the objection. It  
20 has nothing to do with the case.

21 MR. HARDY: The point is that, as you  
22 will see from the evidence in the case, the  
23 companies compete with each other. So, I want you  
24 to keep that in mind because when witnesses suggest  
25 that the companies are not trying to make their

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1 products better, you will see from both your common  
2 sense and our evidence that they are, indeed, trying  
3 to make their products better just like every other  
4 area, every other industry does, automobiles or  
5 tooth paste or whatever it is. They compete with  
6 each other. That's my point.

7 Now, you heard Mr. Rosenblatt talk to you  
8 about a number of things yesterday, and you won't be  
9 surprised, I think, to learn that I don't agree with  
10 much of what he said about what the evidence is  
11 going to be. If I did, I suppose we wouldn't be  
12 here.

13 You heard characterizations about what the  
14 evidence was going to be, and I don't think he got  
15 that quite right so I want to tell you my version of  
16 what the evidence is going to be and remind you that  
17 it's the plaintiff's burden to prove their case.

18 As I said earlier, I'm from Missouri and we  
19 have kind of a goofy motto in our state. It's not a  
20 statement --

21 MR. ROSENBLATT: The motto of the state  
22 of Missouri, while interesting, Your Honor, is not  
23 part of the evidence in this case.

24 THE COURT: I'll take judicial notice  
25 of the motto, okay?

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1 MR. HARDY: You are taking judicial  
2 notice that the motto is "show me"?

3 THE COURT: Yes.

4 MR. HARDY: That's what the plaintiff  
5 has to do. He has to show you, and it's our  
6 position that he'll not be able to show you in this  
7 case. That's what I want you to keep in mind.

8 There is no good strong scientific evidence  
9 that secondhand smoke causes disease in nonsmokers.  
10 The plaintiff will not be able to show you that  
11 because the evidence isn't there. There's some  
12 evidence, but you will be surprised at how weak the  
13 evidence is, and I want to talk about what that  
14 evidence is going to be.

15 Now, again, repeating something you heard  
16 yesterday, secondhand smoke is composed of  
17 mainstream smoke that the smoker breathes out, and  
18 it's composed of sidestream smoke that comes off the  
19 burning end of the cigarette.

20 What Mr. Rosenblatt didn't tell you, what  
21 your common sense and the evidence will, is that  
22 it's diluted hundreds or thousands of times by the  
23 air in the room where it's located. Keep that in  
24 mind. That's very important, and the reason it's  
25 important is because, although the expression may be

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1 crude, it's true, the poison is in the dose, or the  
2 other way around, the dose makes the poison.

3 Almost anything, as you will hear from the  
4 experts in this case, almost anything in the world  
5 is harmful if you get too much of it and almost  
6 nothing is harmful if the dose is small enough. So,  
7 keep that in mind when we are talking about  
8 secondhand smoke.

9 And you will see from the evidence that the  
10 amount of secondhand smoke that somebody is exposed  
11 to in, say, a year, is so tiny that it is almost not  
12 measurable. And that's true even if you are talking  
13 about the smokiest kinds of conditions like a saloon  
14 or bar where there isn't any no smoking section,  
15 much less an airline cabin, and I'll get to that in  
16 a moment.

17 So, if that's true, if the amount is so  
18 small, then why are we here? Well, Mr. Rosenblatt  
19 talked about this a little bit yesterday. I think  
20 the way he put it is we are going to be talking  
21 about agendas all through the case in our evidence.

22 I don't think you will hear much of that.  
23 I'd put it a different way. The evidence will show  
24 that the idea of secondhand smoke causing disease is  
25 the politically correct view today. It's the

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1 popular thing that you see in the media. And when  
2 you think about it, it makes sense that it would be  
3 that way. After all, you will learn from the  
4 witnesses that there are a lot of people who want to  
5 get rid of smoke. Smoking is legal, but a lot of  
6 people want to get rid of it.

7 Now, if you say, well, you know, I know  
8 there are warnings on the packages and I could smoke  
9 if I want to, that makes sense. It's your choice,  
10 unless people start convincing you that if you smoke  
11 you may be hurting somebody else and, of course, if  
12 you think that's true, then maybe you are worried  
13 about smoking.

14 So, people who want to get rid of smoking  
15 view this concept of secondhand smoke as a danger,  
16 as a way to accomplish that. That's what I mean by  
17 it's the politically correct view, and you will hear  
18 that from the witnesses. The problem is the science  
19 is not there, and that's what we're in this  
20 courtroom to talk about.

21 You will see that a key point in this case  
22 is the Environmental Protection Agency's Risk  
23 Assessment. It's a long way to describe it, so  
24 we'll call it the EPA report. Mr. Rosenblatt talked  
25 about it yesterday, and I think that report shows

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1 just how strange the secondhand smoke evidence is.  
2 It refers to or relates to lung cancer.

3 Now, Mr. Whiting is going to talk about it  
4 at some length, and so I won't. But I do want to  
5 mention a few things so you will get an idea of  
6 where we are going in discussing the EPA report that  
7 Mr. Rosenblatt said we were going to nitpick pick.

8 There's a standard that science uses, a bar  
9 they use when they do an epidemiological study or  
10 test, and what it amounts to is they want to have  
11 what they call a 95 percent confidence interval or  
12 confidence level that they are right or this makes  
13 sense, that the data that they developed has  
14 meaning. Everybody does 95 percent or higher.

15 The EPA, when it got to looking at the  
16 studies, lowered the bar. They lowered the  
17 standard. They doubled the chance for error. They  
18 finished their work in 1992. They didn't do any  
19 studies. They just looked at other studies and  
20 considered 11 out of the 30 or 40, and they finished  
21 their work in 1992.

22 But before they put their report out, two  
23 new United States studies came out. One was  
24 Stockwell, one was Brownson. Both of those reports  
25 came out, and what did the EPA do? They said, well,

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1 the deadline's passed, we haven't put our report  
2 out, but the deadline for consideration has passed.  
3 We won't look at those two reports.

4 And then, when they did get their risk that  
5 they calculated from these other 11 out of 30 or 40  
6 studies, it was so small that most epidemiologists,  
7 most statisticians would call it meaningless.

8 And that's really all I'll say at this point  
9 about it since Mr. Whiting is going to discuss it,  
10 and you are going to see a lot of evidence about  
11 this report.

12 It doesn't take science to tell us that  
13 environmental tobacco smoke or secondhand smoke or  
14 passive smoking or involuntary smoke, whatever you  
15 want to call it, can be annoying. It can be  
16 annoying to smokers and it can be annoying to  
17 nonsmokers. That's not scientific evidence that it  
18 causes disease. When you see the evidence, I think  
19 you will conclude that it's surprisingly weak.

20 Now, I want to talk about fraud a little bit  
21 since Mr. Rosenblatt talked about it a lot. The  
22 plaintiffs pushed that theory, this idea that you  
23 really should hate the companies because they are  
24 evil, populated with evil scientists, evil CEO's,  
25 evil businessmen, evil lawyers. That's the sex

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1 appeal of their case, and you will see the evidence  
2 isn't there to support it.

3 The idea, as I get it, is that it's  
4 scientifically proven that secondhand smoke causes  
5 disease in everybody but the --

6 MR. ROSENBLATT: Objection, Your Honor.  
7 Opening statement is not the time to criticize the  
8 plaintiff's opening statement. It's argument.

9 THE COURT: I would agree with you  
10 there if he's getting into that area.

11 I'm sure you can rephrase it.

12 MR. HARDY: Sure. My point is in this  
13 country, disagreement is not fraud. Honest  
14 disagreement is not fraud. It's a matter of  
15 judgment. And the Surgeon General said that  
16 himself; that this scientific point is a matter of  
17 judgment.

18 If the Surgeon General, for instance, in  
19 1986 says secondhand smoke causes lung cancer in  
20 nonsmokers, the idea is that the tobacco companies  
21 have to say yes, we agree, and we are sorry, because  
22 if we don't, if we disagree, then that's being  
23 dishonest and fraudulent and we are liars. And I  
24 think that's a scary concept that if the boss  
25 speaks, you have to agree or else you are a traitor.

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1           The evidence will show you that the  
2 companies have, indeed, disagreed. They have fought  
3 hard to defend their position in court and in  
4 regulation for 43 years. But the point on this is  
5 they have fought fairly and honestly. They have let  
6 the public know what their position is and they are  
7 entitled to do that.

8           Those are the two main issues in this case:  
9 Does secondhand smoke cause disease in flight  
10 attendants and have the companies behaved properly.

11           Now, the case, as I say, is about airline  
12 cabin attendants and whether they got sick from  
13 being exposed to secondhand smoke in airline cabins,  
14 not on the ground because, of course, when the  
15 airline cabin attendants are not working, when they  
16 are down here in the cities, they are exposed to the  
17 same pollutants we all are, as you will see from the  
18 evidence, diesel exhaust and the like. You don't  
19 have to be a uranium miner; you don't have to work  
20 all your life in asbestos; there is asbestos here in  
21 this courtroom. They have the same exposures we do.

22           So, what we're looking at is did they  
23 develop a disease from secondhand smoke in the  
24 cabins. And if we're asking the question did they  
25 get sick from the cabins, then isn't the first

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1 question you want to know, well, is there some  
2 scientific evidence that airline cabin attendants  
3 get more heart disease and more lung disease and  
4 more lung cancer than other people who are not  
5 flight attendants?

6 I have a chart I want to talk to you about.  
7 Do you want to see this, Your Honor?

8 THE COURT: Yes. If you don't mind,  
9 just hold it up for one second. I assume these  
10 charts have been agreed to by counsel.

11 MR. HARDY: Yes. We talked about them.

12 THE COURT: All right. Let me get the  
13 easel for you.

14 MR. HARDY: I don't think I need it,  
15 but thank you very much.

16 The first point is the air is different than  
17 in the home or the workplace. Now, by that what I'm  
18 talking about, you will see from the evidence, is  
19 that the air is both better and it's worse. It's  
20 better because, unlike what you heard yesterday,  
21 it's replaced every three or four minutes in the  
22 airline cabin. You don't keep getting the same air.  
23 It's replaced much more often, for instance, than it  
24 is in the home or the workplace.

25 On the other hand, it's worse because it's,

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1 well, dryer than what we're usually around, so it  
2 has more of a tendency to irritate your sinuses or  
3 your eyes. And as you know if you do any flying,  
4 it's pressurized and the way you realize that, of  
5 course, is when you are coming down a lot of times  
6 your ears get plugged up.

7       There is no study, no study which says that  
8 flight attendants get more lung or heart disease  
9 than other people. I didn't say there were no  
10 studies. I said there were no studies that say they  
11 get more lung disease or heart disease than other  
12 people.

13       There are some studies, and that's the third  
14 point. There are some conditions in the airline  
15 cabins which do have an affect on cabin attendants,  
16 and you see the first one I have got down there is  
17 radiation. There are some studies about that.

18       As you get closer to the sun, as you go  
19 higher in the air, you have less protection from  
20 radiation and from ozone, and there are some studies  
21 which show not that cabin attendants get more lung  
22 or heart disease; there are no studies that's show  
23 that. There are studies that show that they get  
24 more breast cancer and bone cancer.

25       And finally, even though there was a  
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1 complete smoking ban seven or eight years ago in  
2 1990, the cabin attendants' health complaints, which  
3 they made before the ban, are the same kinds of  
4 health complaints that they still make, and you will  
5 see the evidence on that.

6 Now, in this case you don't have to decide  
7 whether smoking causes cancer in smokers or other  
8 disease in smokers because the plaintiffs are not  
9 smokers. And you don't have to decide if cigarette  
10 smoking is addictive, but I don't think I'm kidding  
11 myself.

12 There's going to be evidence on those  
13 subjects Mr. Rosenblatt talked about, and I'm going  
14 to talk about it and I know from -- remember from  
15 the questionnaires, remember we asked you some of  
16 those questions and we asked you some of those  
17 questions in the jury selection process, and we know  
18 that you bring some opinions about that.

19 I realize, for example, that most people in  
20 this country now believe that cigarette smoking  
21 causes lung cancer, and certainly a lot of people  
22 would characterize cigarette smoking as addictive.  
23 And if you have those views coming into this  
24 courtroom, and some of you do, I know, that's fine.  
25 We understand that.

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1           Keep your eye on the ball. The ball is  
2 secondhand smoke and disease. That's what the  
3 evidence is about in this case. That's all we ask.  
4 Certainly, this could be a clear straightforward  
5 trial. Here's the level of secondhand smoke in  
6 cabins of airplanes. This is what airline  
7 attendants are exposed to. This is how long they  
8 are exposed. These are the conditions. What do you  
9 think?

10           But it isn't going to be that simple because  
11 the plaintiff says there has been a 43-year  
12 conspiracy and fraud and system of lying by the  
13 companies. And we have to respond to those things,  
14 and in order to do it you have to have a history  
15 lesson.

16           I want to take it back farther than  
17 Mr. Rosenblatt did yesterday. You do have to  
18 understand what cigarette companies have faced and  
19 what the attitude of the public has been for a long  
20 time because this controversy about smoking and  
21 health did not just burst on the scene when the  
22 first Surgeon General report came out in 1964, and  
23 it didn't occur for the first time when those mouse  
24 skin painting studies were done in '54, and it  
25 didn't occur for the first time in '44 or '34. It's

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1 been around since before the turn of the century.

2 Insofar as cigarettes themselves are  
3 concerned, the controversy has been around since  
4 they came into existence. If you are talking about  
5 tobacco, the controversy goes back hundreds of  
6 years. Before there were cigarettes, tobacco was  
7 smoked in pipes, chewed, rolled in something like  
8 what are now cigars.

9 But then the rolling machine was invented.  
10 Cigarettes became very popular in the 20th century.  
11 And before any of us were born, cigarettes were  
12 called cancer sticks, coffin nails.

13 Why am I telling you this? I'm telling you  
14 so you will understand how long there has been a  
15 controversy about something that the plaintiffs say  
16 we fooled the public about.

17 Between 1895 and 1921, before the alcohol  
18 prohibition era, there were 15 states which banned  
19 the sale of cigarettes.

20 Between 1895 and 1921, 15 states in this  
21 country had outlawed the sale of cigarettes.

22 The Florida Department of Health said that  
23 cigarettes were the worst form of addiction. When  
24 do you think they said that? 1906.

25 A U.S. Senator in 1929 said he thought the

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1 cigarette companies were trying to addict people.

2 This controversy has been going on, in other  
3 words, for a very very long time. Ever since  
4 cigarettes became popular, you have athletes  
5 smoking, you had entertainers smoking and you had  
6 politicians smoking and you had scientists smoking,  
7 and you had all those same kinds of people being  
8 critical of cigarettes.

9 Now, there were, indeed, some scientific or  
10 some medical questions raised in the middle part of  
11 this century, but the real science and the medicine  
12 started about the time Mr. Rosenblatt said it did.

13 There are at least two doctors, they were in  
14 St. Louis, actually, Everett Graham and Ernst  
15 Winder, and here's what they did: They took this  
16 strain of mouse, a type of mouse that was known to  
17 be susceptible to skin cancers, and they shaved the  
18 backs of the mice and then they took cigarette smoke  
19 and they condensed it into something that's called  
20 tar.

21 You don't get tar when you smoke cigarettes,  
22 but if you chill and condense the smoke, you create  
23 this tar-like substance, and that's what they call  
24 it, tar. And then they slathered or painted this  
25 tar on the shaved backs of the mice, covered the

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1 pores, and some of the mice developed skin cancers,  
2 and that was big news, very big news. The country  
3 reacted to it, the cigarette companies reacted to  
4 it, science reacted to it.

5 And I have a time line that I'm going to  
6 show you about the government regulation, give you a  
7 sample of the kinds of things that have been going  
8 on in the 43 years since then, and I show this to  
9 you. I want to explain in advance.

10 I'm showing this to you basically because  
11 the plaintiffs say that while all this was going on,  
12 we were lying to the public and lying to science and  
13 lying to the government. So, I want you to see just  
14 a sample of what was going on when we were  
15 supposedly lying and fooling people.

16 MR. HARDY: Can you all see that or do  
17 I need to turn it?

18 Is that better?

19 You look at this and say, oh, no, is he  
20 going to talk about all this stuff? And  
21 unfortunately, the answer is yes, I am, and I'm  
22 going to do it because I want you to get a feeling  
23 for how much is going on in government and science  
24 during this 43 years that we were supposedly fooling  
25 people.

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1           And what I have done is I have colored the  
2 topics that have some relationship to each other, so  
3 I'm going to talk to you about them that way. It  
4 will go a little bit quicker.

5           The first one, contrary to what I just said,  
6 everything in yellow has very little relationship to  
7 each other. But you heard about the mouse skin  
8 painting studies. Mr. Rosenblatt talked to you  
9 yesterday about the Frank Statement.

10          In 1977 the first big congressional hearings  
11 occurred. They were called the Blatnik hearings.  
12 And then a very interesting thing happened in '68.  
13 The federal government formed an organization with  
14 the tobacco companies' scientists called the Tobacco  
15 Working Group.

16          The U.S. Public Health Service had set up  
17 through the National Cancer Institute a less  
18 hazardous cigarette research program, and for ten  
19 years the government worked with tobacco scientists  
20 trying to find what they called a less hazardous  
21 cigarette. And then, in 1977, the government  
22 changed its mind and closed that project down.

23          There had been a number of reports, lots of  
24 efforts made, no success. They closed the program  
25 down in 1977.

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1           The only thing I left out is in the  
2 meantime, in between the beginning and the end of  
3 that program, the government had also banned all  
4 television and radio advertising of cigarettes, and  
5 some of you remember that ban, I'm sure.

6           Now, looking at the orange categories, in  
7 1955 the government's Federal Trade Commission said  
8 to the companies you cannot advertise tar and  
9 nicotine in your cigarettes. You cannot tell the  
10 public how much tar and nicotine is in the  
11 cigarettes. That was a guideline of the Federal  
12 Trade Commission set up in 1955.

13           In 1965 the Federal Trade Commission said,  
14 oh, yes, you can. You can tell them. You don't  
15 have to tell them, but we are eliminating the  
16 prohibition. If you want to advertise tar and  
17 nicotine in your cigarettes, you can do it.

18           The next year the Federal Trade Commission  
19 said not only that, here's what we're going to do:  
20 We are going to set up a lab and we are going to set  
21 up procedures for how you test cigarettes and we are  
22 going to determine how much tar and nicotine is  
23 delivered in each brand of cigarettes and we are  
24 going to make the rules about how that has to be  
25 done, and they have been doing it ever since for 31

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1 years.

2       Some people, I believe, get the idea that  
3 the companies are free to change the levels of tar  
4 and nicotine in their cigarettes and nobody knows  
5 how much is delivered. Untrue. For 31 years there  
6 has been a government procedure for testing, and the  
7 tar and nicotine levels are known by the government  
8 on every brand of cigarettes.

9       And then, in 1971, the Federal Trade  
10 Commission said you have to advertise tar and  
11 nicotine levels in your cigarettes. '55, can't do  
12 it. '65, you can if you want to. '71, you have to.

13       All right. Let's go to now. In the spring  
14 of 1962, President Kennedy said at that time he  
15 wanted a study made on the smoking and health issue  
16 and a report to the Surgeon General, and that first  
17 report came out in January of 1964 saying smoking  
18 caused cancer and was a habit, not an addiction.

19       The next year there were congressional  
20 hearings on labels, that is, should we have warnings  
21 on the packages. The companies said no, you don't  
22 need them because everybody already thinks there's a  
23 danger. Scientists outside the company said the  
24 same thing; you don't need them, it's already known  
25 or believed that there's a risk.

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1 But a lot of people disagreed with that,  
2 including Congress. And so, January 1, 1966,  
3 Congress issued the first Cigarette Labeling and  
4 Advertising Act and said you have to put a warning  
5 on the package, and you will see it in a minute.

6 In '69 they had hearings again and changed  
7 the warning and as of November 1970 required a  
8 different warning.

9 In '72 the Federal Trade Commission said you  
10 have to put the warnings on all advertising, not  
11 just on the packages, on all advertising. It's been  
12 there for 25 years since.

13 1985 hearings or '84 hearings were held and  
14 then in '85 Congress said, well, there's a new  
15 warning, rotating warnings that you have to put on,  
16 and they have been on ever since.

17 Now, you saw -- I think Mr. Rosenblatt  
18 showed you one of them yesterday, I'm not sure, but  
19 here's the first one. Caution: Cigarette smoking  
20 may be hazardous to your health. That was on from  
21 January 1, '67 to October 1970 required by the  
22 federal government on every single pack of  
23 cigarettes was this warning. This is the time  
24 period when the plaintiffs say we were fooling  
25 government.

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1           Who is being duped during this time period?

2           The next warning, November 1970 to October  
3 '85: "Warning: Surgeon General has determined that  
4 cigarette smoking is dangerous to your health."  
5 Every package of cigarettes during that time period,  
6 every advertising -- every advertisement starting  
7 with 1972. Who is being duped? The government?

8           And here is the last warning, the one that  
9 is still on. It consists of one of four. They are  
10 called the rotating warnings because you have to --  
11 you have to rotate them. But each pack, every pack  
12 that's been sold, has had one of those four warnings  
13 on it. And every advertisement -- we'll go to these  
14 gray entries. There are only four of them.

15           '86, indeed, the Surgeon General came out  
16 with a report on involuntary smoking and disease.  
17 And here's the EPA Report I was talking about, the  
18 first draft, the second draft. They put out the  
19 final one January of '93. Then the next year a  
20 federal agency, OSHA, had hearings on workplace  
21 smoking, smoking on the job.

22           The secondhand smoke regulation, the idea of  
23 aircraft cabin issues on smoking, goes back to '67,  
24 when Ralph Nader petitioned the Federal Aviation  
25 Administration to ban smoking on aircraft. In 1970

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1 the FAA issued an advance notice. They said,  
2 essentially, "We are going to regulate smoking on  
3 planes." But the next year, having done a study of  
4 it, they said, "Whoops, well, no, there is no health  
5 hazard to nonsmoking passengers," and so in '73 they  
6 said, "Well, we are withdrawing this notice, we are  
7 not going to regulate." Part of the reason they  
8 said that, however, was because the Civil  
9 Aeronautics Board had already required nonsmoking  
10 sections on planes.

11 '79, the CAB comes up with more regulations  
12 guaranteeing seating to nonsmokers, separating cigar  
13 and pipe smokers, banning smoking when the  
14 ventilation system is not functioning fully.

15 Then the Civil Aeronautics Board eliminates  
16 some of these regulations, but not all of them.  
17 Then there are hearings in '84 on cabin safety.  
18 Cigar and pipe smoking is banned. '88, no smoking  
19 on U.S. flights two hours or less. In 1990, no  
20 smoking on U.S. flights of six hours or less,  
21 functionally all U.S. flights. 1996, Congress held  
22 hearings on smoking bans on international flights.  
23 Those are still permitted.

24 I'm sorry about the length of that, but as I  
25 said at the outset, I wanted you to get an idea

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1 about the amount of the federal regulation that has  
2 gone on during this 43-year period. And that is  
3 only a sampling. I didn't put up the federal  
4 hearings on taxation and the annual reports by the  
5 Federal Trade Commission or references to any of a  
6 number of other hearings that have been held.

7 Today smoking has become socially  
8 unacceptable in a lot of places. It's still legal,  
9 but with the restrictions it's harder to make that  
10 choice. Congress has decided, however, thus far,  
11 that smoking should remain a legal product. After  
12 the experience of prohibition, they have decided to  
13 make it legal or allow it to continue to be sold but  
14 to regulate it heavily with taxes and rules about  
15 warnings and advertising restrictions of all kinds.

16 To put it another way, Congress has decided  
17 that adults can choose to smoke, like they can  
18 choose to ride fast horses and drink alcohol.

19 MR. ROSENBLATT: Excuse me, Your Honor,  
20 objection. The evidence is not going to show  
21 unless---

22 THE COURT: I would like to know who is  
23 going to say that. If you are going to make that  
24 specification, fine. If you are going to tell me a  
25 witness is going to come in and say that---

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1 MR. ROSENBLATT: I don't think they are  
2 going to have a congressman who is going to say  
3 that.

4 MR. HARDY: I don't understand. There  
5 is no dispute the product is legal.

6 THE COURT: That's different. It's the  
7 characterization -- sustained.

8 MR. HARDY: There have been thousands  
9 of health studies by the government, by colleges, by  
10 universities, by private organizations, here and  
11 throughout the world, on smoking and health.  
12 Mr. Rosenblatt said you don't need anymore studies  
13 on cigarette smoking and health, but they continue  
14 to go on everywhere, not just within the companies.

15 Congress has had every conceivable kind of  
16 hearing, has consulted with agencies, scientific  
17 organizations and the tobacco companies. No product  
18 has ever been so researched, so studied, so  
19 regulated, and yet the plaintiffs say that in the  
20 midst of all this we were lying. Think about that  
21 as the evidence comes in.

22 Now, I stress, I think the evidence will  
23 stress what the companies did, not what individuals  
24 say, but what companies did over this 43-year  
25 period. And I ask you to remember that everything

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1 that the companies have done during this time period  
2 from 1954 on has been in the middle of this raging  
3 debate that you saw evidence of in the time line.  
4 And it goes on today. There hasn't been a moment  
5 since 1954, not a moment, when the cigarette  
6 companies weren't faced with lawsuits. And there  
7 have been constant hearings.

8 Now, I am not going to represent -- there is  
9 no way I can -- that there has never been a goofy  
10 idea or thought put down on paper or expressed by an  
11 employee of a company. But the main thing, as I  
12 think you will see from the evidence, is that the  
13 companies themselves made the right decisions and  
14 they made the right choices. And they have fought  
15 fairly all along. Indeed, they have fought. They  
16 have disagreed with the government at every level  
17 frequently. But they have fought fairly.

18 Now, does cigarette smoking cause lung  
19 cancer in smokers? And indeed, I will tell you  
20 exactly what Mr. Rosenblatt said I was going to tell  
21 you, that cancer is a complicated series of diseases  
22 about which science still does a lot of research and  
23 still doesn't understand a lot.

24 Plaintiffs acknowledge that not every smoker  
25 gets cancer, but that's not quite the way I would

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1 put it, because the way the evidence will show it is  
2 that 85 to 90 percent of smokers never get lung  
3 cancer.

4 Second, interesting gap in the scientific  
5 evidence on smoking and health: Nonsmokers get  
6 every kind of lung cancer that smokers get. They  
7 don't get as much of it, but they get every kind of  
8 lung cancer smokers get.

9 Science has been trying -- since the issue  
10 really became significant in the '50s, science has  
11 been trying to do successful animal tests; that is,  
12 have rodents or other animals smoke cigarettes in  
13 chambers and see if they got lung tumors. And they  
14 haven't been able to do it. They haven't been able  
15 to create lung tumors in test animals.

16 Now, some of you may not like the idea of  
17 these kinds of rodent tests going on, but that's  
18 what science does. And they have tried repeatedly  
19 to induce lung tumors in rodents and other animals  
20 and haven't been able to do it, and the Surgeon  
21 General admits that.

22 The people of some countries smoke more than  
23 Americans do and get less lung cancer. The people  
24 of other countries smoke less than Americans and get  
25 more lung cancer. Why is that?

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1           And indeed, science does not understand the  
2 precise mechanism, dot not understand just how it is  
3 that that first cell mutates or changes and starts  
4 to grow out of control. You don't have to know that  
5 to know how to treat the disease. But usually  
6 science wants to know the how, they want to know the  
7 mechanism. They want to understand the how, why a  
8 disease occurs. Because until you understand how,  
9 you can't be sure, in the case of lung cancer, for  
10 instance, that there isn't something else in  
11 addition to or instead of cigarettes or asbestos, or  
12 whatever you are considering at the time, that  
13 causes the disease.

14           So as I said earlier, there are gaps in the  
15 evidence, and as long as that's true, as long as  
16 there are unanswered questions on causation, it is  
17 perfectly proper for anybody, including the tobacco  
18 companies, to insist that the scientific procedures  
19 be followed in determining causation.

20           You don't determine causation by a  
21 popularity vote. You don't ask for a show of hands  
22 on whether something is a cause. You have  
23 scientific method, you have scientific procedures,  
24 rules that you follow in science and medicine to  
25 determine that sort of thing, and you have to follow

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1 those rules. And until all the answers are in, it  
2 is not dishonest, it is not a lie for people to  
3 question the evidence and for people to insist the  
4 answers be provided.

5 The tobacco executives, the tobacco  
6 scientists, have concluded that there is statistical  
7 support, no question about it, for the fact that  
8 people are at higher risk of disease if they smoke  
9 cigarettes. "Why" is the unanswered question. And  
10 as long as that question is unanswered, it is not  
11 dishonest to disagree, no matter who you are  
12 disagreeing with.

13 I want to talk just a minute about research.

14 I don't know when you want to break, Your  
15 Honor.

16 THE COURT: Go ahead. Finish up.

17 MR. HARDY: You want me to keep going?  
18 Okay. I think I have probably got about another  
19 hour.

20 THE COURT: If they need a break, they  
21 will let me know.

22 MR. HARDY: If evidence starts to  
23 appear that your product may cause disease, I am  
24 not -- I am talking about cigarette companies, of  
25 course, but I am talking about any industry, too --

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1 what's the proper thing to do? Do you sit back and  
2 say, "Well, we'll let the government and science  
3 figure this out; meantime, I will just keep selling  
4 the stuff?" or do you get in and look into it and  
5 help try to find an answer?

6 I think the answer to that is obvious. You  
7 try to help. I can think of at least three types of  
8 research. There's in-house research, where you try  
9 to improve your product internally, and I suppose  
10 every competitive industry does that. And then  
11 there is outside research.

12 Now, you can go at that, as far as I can  
13 tell, in at least two ways. You can say, "Well, we  
14 are going to take the money and we are going to  
15 decide what kind of work we want done, but because  
16 we realize that the public and other people may not  
17 be as impressed with the work if we do it in-house,  
18 we will take the money and we will give it to this  
19 organization and we'll tell them to do the study."  
20 And that's called contract research, where you  
21 contract with somebody to do an inhalation study or  
22 where you contract somebody to do skin painting.

23 Then the third type would be where you say,  
24 "We are going to wash our hands of the whole thing,  
25 really. What we will do is take the money and give

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1 it to an organization and we will ask the  
2 organization to determine who gets the money for  
3 research and for what research."

4 And the tobacco companies have done all  
5 three of those kinds of research -- inside, outside  
6 contract and outside grant. That's the last kind I  
7 was just talking about, grant research. They have  
8 done all three kinds of research ever since this  
9 controversy started.

10 You will hear testimony from company  
11 scientists who will -- who will talk to you about  
12 what they have done, what's been done inside. And  
13 that's not surprising. You would expect them to be  
14 trying to make a safer cigarette.

15 At one point -- and that was the Tobacco  
16 Working Group that I showed you on the chart with  
17 the U.S. Public Health Service. At one point both  
18 government and the companies, and all of science, I  
19 think, thought, well, maybe if we can figure out  
20 what the culprit is, maybe if we can determine that  
21 there is something bad in cigarettes in particular  
22 that's presenting the problem, we can fix it. And  
23 to date that has indeed proved to be overly  
24 optimistic, because there is no agreement in science  
25 about what the problem is.

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1           Now, Mr. Rosenblatt talked about carcinogens  
2 and he said those are things that cause cancer in  
3 humans. Well, carcinogens are things which have  
4 been shown to cause cancer in certain circumstances  
5 in animals when you inject enough of it under the  
6 skin of a rodent; for instance, you can get a tumor.

7           And then there is something called a Class A  
8 human carcinogen, which is where a person or  
9 organization says, "I think this stuff in the right  
10 kind of concentration in the right circumstances  
11 probably would cause cancer in humans. But nobody  
12 says, "We know that there are particular substances  
13 in cigarette smoke which cause cancer in humans."  
14 That's what the controversy is about. That's what  
15 science is trying to figure out is, is there  
16 something in there that's doing this damage and, if  
17 so, what is it?

18           As the equipment has improved, as science  
19 and technology has improved, the companies have  
20 tried to understand everything in their product.  
21 Mr. Rosenblatt talked about, I think, 4,000  
22 constituents of cigarette smoke. That's a number  
23 that has increased over the decades as the equipment  
24 got more sensitive.

25           And you will see that the companies have

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1 looked at every conceivable problem. No matter who  
2 suggested it, no matter how far-fetched it was, they  
3 have looked at things which you will find to be  
4 annoying in technical terms: Phenols. This one I  
5 had to practice -- polycyclic aromatic hydrocarbons.  
6 They studied those for a long time. Nitrosamines  
7 they have studied since the 1970s.

8 Mr. Rosenblatt talked about Ray Morgan, the  
9 ex-Philip Morris employee who he says found the  
10 deadly nitrosamines in Virginia Slims and his boss  
11 told him to destroy it. Well, we think the evidence  
12 will show that didn't happen.

13 But in any event, science has been studying  
14 nitrosamines for more than a decade before Ray  
15 Morgan was doing these studies that he talked about,  
16 if he was doing them. And in fact, I think there  
17 was a reference to 1989. In fact, the '86 Surgeon  
18 General Report said that there were more  
19 nitrosamines in sidestream smoke in test chambers  
20 than in mainstream smoke, and that was 12 years  
21 before the study. They were citing the '77 report,  
22 so science knew all that stuff.

23 They looked at benzo(a)pyrenes. They have  
24 been studying benzo(a)pyrenes on and on since the  
25 '50s. They have tried what's called selective

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1 reduction, where you try to take, through filters,  
2 for instance, certain things out of tobacco and  
3 leave everything else alone. And it didn't work  
4 very well. And they have tried general reduction.  
5 And of course you know filters have been on  
6 cigarettes for 40 years or more.

7       They have even tried heating tobacco instead  
8 of burning it. That was a cigarette that R.J.  
9 Reynolds made called Premier, which didn't sell. It  
10 crashed on the market. Mr. Whiting may talk about  
11 that some more. Philip Morris put out a cigarette,  
12 I think it was called Next, which didn't have any  
13 nicotine in it, wouldn't sell.

14       You will also hear evidence of scientific  
15 research that companies have supported at outside  
16 organizations and at universities. But I want to  
17 talk for a few moments here about the Tobacco  
18 Industry Research Committee, which is later called  
19 the Council for Tobacco Research, because that is  
20 one of the most important things that the industry  
21 has done and, not surprisingly, it is also what  
22 Mr. Rosenblatt most savagely attacked yesterday.

23       You remember that I, he showed you -- or I  
24 showed you the formation of TIRC on the time line  
25 and Mr. Rosenblatt talked about that with the Frank

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1 Statement yesterday, and I want to show you that  
2 same Frank Statement again and explain something in  
3 this to you. I don't know whether you can all see  
4 this or not, but if you look at this part of the  
5 description here, of course you can see from the  
6 name of the organization that there is no pretense  
7 by the companies that this wasn't associated with  
8 the tobacco industry. That's part of the name. Of  
9 course it's the tobacco industry.

10 This is an interesting part: In charge of  
11 the research activities of a committee will be a  
12 scientist of unimpeachable integrity and national  
13 repute. In addition there will be an Advisory Board  
14 of scientists disinterested in the cigarette  
15 industry. A group of distinguished men from  
16 medicine, science and education will be invited to  
17 serve on this board. These scientists will advise  
18 the committee on its research activities.

19 That is the grant program that I was talking  
20 about when I was describing the three kinds of  
21 research. That's the grant program. That's the  
22 main function of the Council for Tobacco Research  
23 and has been since it came into existence.

24 Now, this was characterized by plaintiffs'  
25 counsel as a public relations ploy, a public

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1 relations tool, a public relations fraud. The idea  
2 seems to be if it's for public relations, it can't  
3 be good science. CTR is both. It is indeed good  
4 public relations, no question about it. That's what  
5 this -- that's what this ad was for, public  
6 relations.

7 As I said earlier, if there is a thought  
8 that there may be some danger of disease, don't you  
9 want to know that the companies are doing something  
10 about it and what they are doing? So of course it's  
11 good public relations. The question is, is it also  
12 good science? Is it good research? Is this honest?  
13 And you will see from the evidence that the answer  
14 is yes. And I want to talk about that a little bit,  
15 too.

16 The evidence will show you that CTR has been  
17 one of this country's major private funding  
18 resources ever since it came into existence. It has  
19 funded hundreds of millions of dollars of research  
20 on smoking and health, and it has done it with the  
21 top medical schools -- Harvard, Yale, Johns Hopkins,  
22 Stanford.

23 The grant recipients, that is, the people  
24 that got the money and that did the work, have  
25 always had the right to publish their studies. And

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1 they didn't get that right from the tobacco  
2 companies or from CTR after they did the work, they  
3 had the right going in. That's part of the  
4 procedure, is that if they get the money and they  
5 are going to do the work, they can publish whatever  
6 they conclude.

7         And every year CTR published what's called  
8 an annual report, and in that annual report they  
9 reviewed what had been published and gave full  
10 credit for it and did it at their expense. Much of  
11 that research has been called -- is what's called  
12 basic research; that is, you look at how organs and  
13 cells grow, you try to understand what damages them,  
14 you try to understand what the defense mechanisms  
15 are; that is, how does a cell fight off disease, how  
16 does it repair itself if it's insulted or harmed by  
17 something.

18         Scientific researchers have cited and relied  
19 on CTR publications literally thousands of times.  
20 The National Cancer Institute, the United States  
21 Public Health Service, and other government  
22 organizations have cited or relied upon CTR-funded  
23 work and have also participated in the funding of  
24 the work with CTR. Even the Surgeon General's  
25 reports have cited CTR work hundreds of times, and

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1 the reason I am taking the time with this is because  
2 plaintiffs' counsel says that CTR is a fraud.

3 The first Surgeon General's report in '64  
4 specifically thanked CTR for its substantial  
5 contribution and cooperation and then cited a lot of  
6 the work, and the citations have gone on year after  
7 year since then.

8 Now, the way it happens is that the tobacco  
9 companies in this grant program -- and that's all I  
10 am talking about now, that paragraph I read to  
11 you -- they take the money and they give it to the  
12 Scientific Advisory Board as an annual budget, and  
13 that's where the tobacco companies' involvement ends  
14 with the grants program, because the scientific  
15 director and the Scientific Advisory Board decide  
16 who they are going to give the money to from outside  
17 applications that are sent in. And that's a  
18 procedure that is followed, I think, generally  
19 throughout the medical community, not just at CTR.

20 The first director, Clarence Cook Little,  
21 was the past president of the American Cancer  
22 Society. Some of the Scientific Advisory Board's  
23 members have been people who were with the National  
24 Cancer Institute.

25 In the 1970s and the early '80s, you will

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1 see from the evidence that at the companies the  
2 lawyers and the executives, the businessmen, the  
3 scientists, argued a good bit about CTR. Was it  
4 really doing its job? Was it really doing what it  
5 was supposed to do? What was it supposed to do?

6 Some people in the companies said, "You  
7 know, I think we ought to take the money away from  
8 CTR, give them less and do more in-house instead of  
9 outside." Some people said, "I think what we ought  
10 to do is use CTR for nothing but defending lawsuits.  
11 Let's just have them fund the work that we are using  
12 to prove our case in court." And some people said,  
13 "No, let's -- as a matter of fact, let's go exactly  
14 the other way and have them spend all the money on  
15 grant research and not do anything but grant  
16 research. Let's don't do any contract work and  
17 let's don't do any special projects." And those are  
18 the other two kinds of work that the CTR has been  
19 connected with, contract work and special projects.

20 Now, I explained contract work to you  
21 already. That's where you basically say, "Well, I  
22 don't want to wait for an application. I want to do  
23 a miscellaneous inhalation study and I want to do it  
24 now. So, companies, why don't you give us, the  
25 Scientific Advisory Board, some more money apart

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1 from the budget, and we will give it to these people  
2 and we will let them do an inhalation study."  
3 That's contract work -- special projects or work  
4 that was done for a number of reasons.

5 But the principal reason was to defend  
6 lawsuits, and the most frequent suggestions came  
7 from the lawyers. And the idea was we are faced  
8 with all these lawsuits, let's have scientific  
9 research done that we think may be helpful in  
10 defending the cases.

11 That work was not done by people in the  
12 companies. It was not done by people who were on  
13 the tobacco company payroll. It was not secret  
14 work. It was not hidden. The same rule applied.  
15 This is not done through the Scientific Advisory  
16 Board. This is where one or two companies support a  
17 special project. They pay the money to the CTR  
18 staff that handles the bookkeeping.

19 But the people that did the work, again,  
20 were from places like Harvard, eminent scientists  
21 and doctors. And they also have the same right, the  
22 right to publish whatever they found, a right given  
23 to them before the work was done. There was nothing  
24 secret or hidden about it at all. And that's the  
25 other category of work that CTR was associated with.

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1           Now, Mr. Rosenblatt talked to you yesterday  
2 about our efforts to persuade the government, the  
3 federal government and state governments and cities,  
4 to do something or not to do something. And it's  
5 true that the companies have often disagreed with  
6 the government at all levels.

7           You have heard about the activities of The  
8 Tobacco Institute, which speaks for the tobacco  
9 companies. What this amounts to is that the  
10 companies have exercised their First Amendment  
11 constitutional rights to make their views known to  
12 Congress or to states or to cities.

13          That's the same thing labor unions do,  
14 including the flight attendants' union. That's the  
15 same thing that the American Medical Association  
16 does or the American Cancer Society.

17          MR. ROSENBLATT: Objection, Your Honor.  
18 This is argument.

19          THE COURT: Well, I am going to -- what  
20 he's been saying has been argument. I have been  
21 waiting---

22          MR. ROSENBLATT: I have restrained  
23 myself.

24          THE COURT: Counsel, you are under the  
25 same rules plaintiff was under vis-a-vis arguing a

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1 point to try to establish a theory, trying to  
2 persuade.

3 MR. HARDY: All right. Fine.

4 THE COURT: It doesn't apply to  
5 these---

6 MR. HARDY: Okay. I want to say a few  
7 words finally about addiction. And as you will see  
8 from the evidence that comes in from witnesses here,  
9 that is a word with a million meanings. It has  
10 nothing to do, of course, you would think, with a  
11 secondhand smoke case involving nonsmoking flight  
12 attendants, but plaintiffs say that we have been  
13 fraudulent and lied in connection with addiction,  
14 too, so we have to deal with that.

15 It is a substance, nicotine, which occurs  
16 naturally in the leaf. When tobacco grows in the  
17 field, nicotine is in it -- always, always more  
18 nicotine than you have in a cigarette.

19 In the manufacturing process the nicotine  
20 level goes down, always. The cigarette companies do  
21 not spike their cigarettes. Some people, I think  
22 because of all the publicity in the last few years,  
23 believe that cigarette companies put nicotine in  
24 cigarettes to raise the levels. They don't do that.  
25 And I have already talked to you about the testing

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1 methods and the rules that have been required since  
2 1966, about how you determine tar and nicotine  
3 disclosure. Cigarettes, when manufactured, have  
4 always had lower amounts of nicotine than what was  
5 in the tobacco when the process started. It's  
6 inevitable.

7 Now, tar has been reduced because -- well,  
8 for several reasons. That's what consumers wanted.  
9 Also, that's what the government in 1976 suggested.  
10 They said, "We want more low-tar medium-nicotine  
11 cigarettes." Well, when the tar comes down, the  
12 nicotine comes down at about the same rate.

13 So you have all kinds of levels of tar and  
14 nicotine cigarettes available to the consumer,  
15 although you have nothing like the levels that --  
16 much lower than the levels that were around in the  
17 1950s. There's now a wide range of choice for  
18 people to make.

19 Why do people smoke? Well, there are lots  
20 of reasons why. I guess you might get a different  
21 one every time you ask a different smoker. Some  
22 people smoke to relax. Some people, for a social  
23 crutch. For taste. For nicotine. Certainly people  
24 smoke cigarettes for nicotine. That's part of the  
25 reason, just like they eat candy for sugar and eat

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1 potato chips for fat, salt, and drink coffee for  
2 caffeine.

3         Those substances, caffeine and sugar, salt,  
4 have what are called pharmacological effects. They  
5 have effects on the brain. It doesn't make them  
6 addictive. It doesn't make cigarettes addictive.  
7 And yet many people would say, "Yes, cigarettes are  
8 addictive. I don't care what kind of fancy words  
9 you use, cigarettes are addictive."

10         Well, meaning what? Meaning that it can be  
11 hard to quit smoking? Fair enough, if that's what  
12 you mean by addictive. If you smoke more, smoke a  
13 lot, you smoke for a long time, and cigarette  
14 smoking becomes an important part of your life, it's  
15 likely to be a hard habit to break, just like many  
16 habits. Keep in mind that the same Surgeon General  
17 in 1988, Everett Koop, who said cigarette smoking is  
18 addictive, said video games are addictive.

19         Now, some people in recent years have  
20 compared cigarettes and nicotine to crack cocaine  
21 and heroin. Your common sense and the evidence will  
22 tell you that there is a real difference, that they  
23 shouldn't be discussed in the same breath.

24         The test is, when you are using a product,  
25 does it cause you to be intoxicated or does it make

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1 you hallucinate? Do you see things that aren't  
2 there? Do you become a danger to yourself or to  
3 other people? Do you get so you can't function on  
4 the job or you can't function as a parent? Are you  
5 more likely to commit crimes?

6 THE COURT: Counsel, this is all in the  
7 way of argument. I mean, up to a point, I am  
8 going---

9 MR. HARDY: Your Honor, the witnesses  
10 will testify---

11 THE COURT: Then say so and then  
12 specify under what circumstances the witnesses will  
13 say.

14 MR. HARDY: Very well, Your Honor.

15 THE COURT: Right now it appears that  
16 it's all your view, and that would be improper.

17 MR. HARDY: Qualified witnesses will  
18 testify to what I have just said with respect to  
19 cigarettes and issues of addiction and hard drugs  
20 and will differentiate hard drugs from cigarettes  
21 and coffee, just as I have done.

22 The companies have done research for decades  
23 trying to understand why people smoke, and you would  
24 expect them to do that. And science is still  
25 looking at that question. But one thing we do know

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1 is that 50 million people have quit smoking  
2 cigarettes, most of them on their own, without any  
3 help. It is indeed precisely a matter of willpower,  
4 how badly you want to quit.

5 In 1964 the Surgeon General knew that and  
6 called it a habit. In 1988 he changed the  
7 definition and the meaning of the term and he called  
8 it an addiction. And it really does come down to  
9 however you want to define it.

10 Now, I have been up here long enough and I  
11 appreciate you being attentive. When Mr. Rosenblatt  
12 has finished putting his evidence on, we will show  
13 you our side of this case. We will present the  
14 evidence of doctors and scientists who have studied  
15 air cabin quality who deal with the question or the  
16 comments that I made earlier -- the poison is in the  
17 dose, the dose makes the poison. That is a  
18 toxicologist who specializes in that kind of work.  
19 Epidemiologists, who have studied the statistical  
20 work that's been done, people in the companies and  
21 outside the companies.

22 These opening statements are indeed more  
23 than just previews of the evidence. They are  
24 promises by the lawyers as to what the evidence is  
25 going to be. And so when you have heard all the

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1 evidence, you can look back at the promises we made  
2 and answer the question, did we keep the promise.

3 You are hearing a little bit more in the way  
4 of opening statements and then you will hear the  
5 facts. And I thank you very much.

6 THE COURT: All right. You folks want  
7 to take a break at this time?

8 JUROR NO. 63: Yes.

9 THE COURT: If you will go in the jury  
10 room, leave your note pads on your seat, cover it.

11 Gentlemen, ladies, please. There will be a  
12 break.

13 Go in the jury room. Do not discuss the  
14 case. Do not think about the case. Try to relax  
15 inside. It won't be too long, but I know you have  
16 facilities you can use. Go ahead inside and we will  
17 be with you shortly.

18 (Thereupon, the jury exited the  
19 courtroom and the following proceedings were had:)

20 THE COURT: Well, I do appreciate the  
21 fact that you folks want to rise in deference to the  
22 jury, and I do understand that. Please give me a  
23 chance to talk to them before you all stand up. I  
24 appreciate it.

25 Thank you. We will be in short recess.

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1 (Short recess.)  
2 THE COURT: Who is next, please?  
3 MR. WHITING: I am, Your Honor.  
4 THE COURT: Ready?  
5 (Thereupon, the jury entered the  
6 courtroom and the following proceedings were had:)  
7 THE COURT: Have a seat, please. Thank  
8 you.  
9 Mr. Whiting?  
10 MR. WHITING: Your Honor, if I may, I  
11 am going to move this.  
12 THE COURT: Yes, go ahead.  
13 MR. WHITING: May it please the Court,  
14 ladies and gentlemen of the jury, Miss Broin,  
15 Miss Young, Counsel. My colleague, Jeff Furr and I,  
16 have the privilege of representing R.J. Reynolds  
17 Tobacco Company and the 8,000 men and women who work  
18 there.  
19 As Mr. Hardy told you, we are going to  
20 present two opening statements for the defendants.  
21 I will try not to repeat much of what Mr. Hardy  
22 said. I will try to focus what I say on the  
23 evidence you will hear about ETS on airplanes.  
24 The evidence will show that prior to 1990  
25 the government permitted smoking on airplanes and  
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1 all of the domestic airlines allowed passengers to  
2 smoke in designated areas. The plaintiffs claim  
3 that ETS from those passengers caused flight  
4 attendants working on the planes to get a laundry  
5 list of diseases. Plaintiff flight attendants say  
6 the case is simple, that everyone knows that  
7 cigarettes are a serious health hazard, that ETS is  
8 just like smoke, and that ETS must be a health  
9 hazard, too. They claim that ETS on airplanes---

10 MR. ROSENBLATT: Objection, Your Honor.  
11 The purpose of an opening statement is not to attack  
12 the other party's opening statements.

13 THE COURT: Well, I tried to explain  
14 that to the attorneys on both sides of this case at  
15 the very beginning, even before you gave opening  
16 statements. Let's follow the rules and regulations  
17 as they exist. Go ahead.

18 MR. WHITING: The evidence will show  
19 that the plaintiffs allege in their complaint that  
20 ETS on airplanes causes all manner of conditions --  
21 allergies to sinus problems to infertility to lung  
22 cancer to peptic ulcers. And the evidence will show  
23 that what this trial is about is can flight  
24 attendants meet their burden of proving that ETS on  
25 airlines actually caused flight attendants to

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1 develop those diseases.

2 Do some flight attendants get some of the  
3 diseases on the list? The evidence will be, no  
4 doubt, yes. The evidence will show that flight  
5 attendants are not immune from the same illnesses,  
6 the same medical problems that the rest of us get.

7 In fact, there will be evidence that flight  
8 attendants' exposures on airplanes to radiation and  
9 to ozone, and to other conditions on the planes, may  
10 cause flight attendants to come down with certain  
11 diseases.

12 Are the diseases alleged by the plaintiffs  
13 in the complaint unique to flight attendants? The  
14 evidence will be, of course they are not. The  
15 evidence will show that all of us can develop these  
16 diseases even if we never stepped on a plane. The  
17 evidence will show that the flight attendants do not  
18 develop any of these diseases more often than the  
19 rest of us. I can tell you that there will be no  
20 evidence -- none -- that flight attendants have been  
21 shown to develop any disease at any higher rate than  
22 the rest of us.

23 For example, the experts will tell you that  
24 no one knows whether nonsmoking flight attendants  
25 actually develop more lung cancer than other

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1 nonsmokers. You will learn from those experts that  
2 that evidence simply does not exist.

3       There is no different -- there is no  
4 evidence that flight attendants have any different  
5 health problems than the rest of us or that they are  
6 more likely to have health problems than the rest of  
7 us.

8       Plaintiffs said that the evidence would be,  
9 from public health officials and about government  
10 reports, about ETS causing lung cancer in  
11 nonsmokers, but the evidence will show that the  
12 standards used by government agencies are very  
13 different from the standard of proof in a court of  
14 law. Even so, plaintiffs will produce no report  
15 that concludes that the level of flight attendants'  
16 ETS exposure on planes has caused any disease.

17       Yesterday plaintiffs talked to you about  
18 government reports that were issued in 1986 and they  
19 refer to the 1986 Surgeon General's Report and to a  
20 1986 report of the NRC, National Research Council.  
21 What they didn't tell you about was another report  
22 issued by that very same NRC, National Research  
23 Council, in 1986, a report that actually looked at  
24 air quality on airplanes.

25       That is the only government report  
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1 addressing the question about ETS on airlines, and  
2 it refers to ETS as a potential, not a proven  
3 hazard. Not even a probable one, just a potential.  
4 But that's just another way of saying, as the  
5 experts will tell you, scientists don't know the  
6 answer. And there will be no evidence in this case,  
7 none, identifying any component or any part of ETS  
8 that has caused any disease in flight attendants.

9 But the evidence will also show that  
10 understanding ETS is not simple. Scientists at  
11 R.J. Reynolds, Lorillard, B&W and Philip Morris,  
12 have all made very substantial efforts to learn  
13 about ETS, to tell other scientists and public  
14 health officials what they found. During this trial  
15 you will hear from some of these company scientists  
16 and from other experts. They will tell you several  
17 things.

18 First, ETS -- let me just make a note of  
19 these points. ETS is not -- not -- equal to  
20 smoking. The first thing they will tell you is that  
21 ETS is a complicated mixture that changes very  
22 quickly as it spreads out in the air and it's not  
23 the same as the smoke inhaled by a smoker.

24 The second thing they will tell you is that  
25 being around ETS, breathing ETS, is not equal to

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1 smoking a cigarette. People breathe air that  
2 contains ETS in different ways and in hugely  
3 different amounts than smokers inhale mainstream  
4 smoke from a cigarette. Passengers on a plane or  
5 being on a plane with passengers and other flight  
6 attendants who smoke is not the same as smoking  
7 cigarettes yourself.

8 The third thing they will tell you is what  
9 Mr. Hardy already said: Dose makes the poison or  
10 the poison is in the dose. This is an important  
11 point that you will hear about in this trial from  
12 the toxicologists and other experts who will  
13 testify. The dose makes the poison. Too much of a  
14 harmless substance can cause serious health problems  
15 for anyone and small amounts of very toxic  
16 substances will not hurt you.

17 The next thing they will tell you is that  
18 the carcinogens that they talk about appear in ETS  
19 in trace amounts. And what does that mean? Well,  
20 it means that they are measured in terms that you  
21 and I don't normally hear, terms like nanogram. And  
22 the experts will tell you that a nanogram is like  
23 one piece of paper, like the edge of a piece of  
24 paper stacked up in a stack of paper 50 miles high.  
25 A nanogram is just like that edge of paper pulled

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1 out of a stack 50 miles high. And two nanograms is  
2 like that and four is like that, and so on.

3 The fifth thing they will tell you is that  
4 flight attendants -- and I am going to use an  
5 abbreviation -- flight attendants don't get much  
6 ETS. Airlines provide -- when airlines provided  
7 smoking sections for passengers, the flight  
8 attendants actually breathed in the equivalent of,  
9 at most, a few cigarettes per year, a tiny fraction  
10 of a cigarette on any flight.

11 The sixth thing that they will tell you is  
12 that plaintiffs' case is based primarily on  
13 statistical studies, studies of people married to  
14 smokers, people who live and sleep in the same house  
15 seven days a week, 365 days a year, year in, year  
16 out.

17 Plaintiffs' experts say that these number  
18 studies show that nonsmokers married to smokers  
19 develop lung cancer because of their ETS exposure at  
20 home. The scientists will tell you these  
21 statistical studies do not show that ETS actually  
22 causes any disease. They will tell you they are  
23 numbers. And that's what they are, just numbers.

24 The scientists will tell you that they  
25 produce very weak associations and they don't even

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1 come out the same way. They produce inconsistent  
2 results. And there are other basic problems with  
3 them that I will talk about later.

4 Finally, the experts and the scientists will  
5 tell you the most important thing about this case,  
6 and that is that those number studies, those  
7 statistics, don't show anything about ETS on  
8 airplanes. They don't show that any ETS on an  
9 airplane caused any flight attendants to get lung  
10 cancer or any other disease.

11 The time, the work time that flight  
12 attendants spend in the smoking section of airplanes  
13 when passengers were allowed to smoke, is very  
14 different from the time a married person spends  
15 around a smoking spouse. Airplanes and the air on  
16 them is very different than houses and the air in  
17 them.

18 During the evidence -- during the trial you  
19 will hear evidence from independent experts and  
20 company scientists who spent years studying ETS.  
21 They will provide you with the details of each of  
22 these basic points that I have talked about. And  
23 today I will try to give you a preview of this  
24 evidence and only talk to you about three areas:  
25 First, the research that companies have done on ETS;

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1 second, what the evidence will show about the  
2 potential effects, the science about ETS, and  
3 whether it can hurt people; and finally I will talk  
4 to you about what the evidence will show about the  
5 way the companies have worked on design of  
6 cigarettes and other changes to cigarette products  
7 to address perceived concerns about ETS for both  
8 smokers and nonsmokers alike.

9 Let me say that, because I know  
10 R.J. Reynolds better than the other companies, I am  
11 likely to refer to RJR and its people more than the  
12 other companies. But I want to emphasize what  
13 Mr. Hardy said, this is a very competitive business,  
14 and all of the companies have been involved in the  
15 same kind of efforts, and because I might make more  
16 reference to RJR than the other companies doesn't  
17 mean that they are not equally proud of the work  
18 that they have done.

19 During the trial you will hear about a wide  
20 range of the research that the companies have done  
21 on ETS. The evidence will show that what they have  
22 done and have published for other scientists in all  
23 the world to see -- a significant amount of work on  
24 ETS chemistry, ETS measurement, and the potential  
25 effects of ETS in real-world environments -- no

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1 other organizations, the evidence will show, have  
2 contributed as much to the understanding of ETS.

3 Secondly, the evidence will show you that  
4 the companies continually investigate new designs to  
5 address perceived concerns of smokers and nonsmokers  
6 about their products. For example, B&W tested  
7 special cigarette papers to reduce the visibility of  
8 sidestream smoke, and it introduced Capri, a slender  
9 cigarette designed to burn less tobacco and thereby  
10 reduce environmental tobacco smoke.

11 Other companies did other things.  
12 R.J. Reynolds developed and introduced Premier and  
13 Eclipse, cigarettes that heat rather than burn  
14 tobacco and produce almost no ETS.

15 Now, it's important to keep the efforts  
16 regarding ETS in context of what was going on at the  
17 time. What the companies did is important to put  
18 into the chronological context of where the evidence  
19 is at the time. And what you will hear at this  
20 trial is in the beginning of the mid-1960s, the  
21 United States Surgeon General has issued periodic  
22 reports to Congress about the health effects of  
23 cigarettes. Yet, what the evidence will show is  
24 that no Surgeon General issued a report related to  
25 ETS until 1986, just two years before the first

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1 decision by the federal government to ban smoking on  
2 some airplane flights.

3         The evidence will show that in the early  
4 1980s a few statistical studies were published  
5 looking at cancer in nonsmokers married to  
6 smokers -- cancer in nonsmokers married to  
7 smokers -- and you are going to hear the word  
8 "spousal studies" very often in this trial. And  
9 spousal studies refers to the concept of  
10 epidemiological studies, and I am going to try to  
11 talk about that a bit, about nonsmokers married to  
12 smokers and exposures of ETS in the home.

13         Yesterday plaintiffs talked about two  
14 studies that were published in 1981, one from Japan,  
15 and one from Greece. What they didn't mention is  
16 that there was a third study done in 1981, done in  
17 the United States by the American Cancer Society.  
18 And what the evidence will show is that the results  
19 of that study were directly at odds with Japan's  
20 cancer studies, so the evidence will show that there  
21 was an inconsistency in these studies.

22         The evidence will also show you that in the  
23 spousal studies, no one measured actual ETS  
24 exposures. Instead, exposure to ETS for the people  
25 studied was based on the fact that they lived for

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1 extended periods with spouses who smoked. In fact,  
2 the evidence will show that these studies were done  
3 poorly, that they produced very weak statistical  
4 associations and that they were inconsistent and  
5 unreliable.

6 But what the evidence will tell you is that  
7 these studies gave the anti-smokers in this country  
8 a new arrow in their quiver. And what the evidence  
9 will show is, when these studies were published, is  
10 that the anti-smokers saw an opportunity to step up  
11 their campaign against smoking and to make smoking  
12 socially unacceptable. It's one thing to say to a  
13 smoker, you may be hurting yourself. Smokers are  
14 aware of the risks. They choose to smoke because  
15 they enjoy it.

16 What the evidence will show is that if  
17 people believe that ETS might hurt someone else,  
18 it's a more powerful tool for stamping out smoking.

19 MR. ROSENBLATT: Objection, Your Honor.  
20 This is argument. This is social policy.

21 THE COURT: If somebody is going to  
22 come in and testify to that effect, that's fine. I  
23 assume that that's what he's saying in his  
24 statement.

25 MR. ROSENBLATT: No one is going to

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1 come in and testify about---

2 THE COURT: I don't know that. I  
3 didn't take the statement, so I don't know. I can  
4 only assume he's following the Court's ruling.

5 MR. WHITING: What the evidence will  
6 show is from the beginning of the debate the  
7 companies took the ETS issue seriously. They did  
8 what responsible companies do. They learned the  
9 facts before making conclusions, and they were  
10 determined to base their positions about ETS on good  
11 science. Each of these competitive companies  
12 pursued their own programs. Each company wanted a  
13 meaningful understanding about ETS. And the  
14 evidence will show that the results of those efforts  
15 by these company scientists significantly advanced  
16 the understanding of ETS.

17 Among the companies' accomplishments were  
18 the following. It sounds simple when I say them,  
19 but you have to understand that this was uncharted  
20 science at the time. They figured out ways to  
21 collect ETS so that it could be studied.

22 As Mr. Hardy said, ETS is a complicated  
23 mixture that spreads out in the air. You have to  
24 find out how to collect enough of it so you can  
25 really study it. They learned what makes up ETS,

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1 what things are really in it, and how much of them  
2 are true.

3 They developed good ways to measure ETS in  
4 the air, places where people really spent time, not  
5 in a laboratory. They tested whether ETS and  
6 exposure to ETS could be harmful to animals. They  
7 changed the designs of their products to address  
8 concerns about ETS, and they published the research  
9 data that they found.

10 The evidence will show that the companies  
11 took seriously the need to find out ETS and the need  
12 to tell the world what they learned. As I said,  
13 this was an uncharted area at the time. How much  
14 ETS people were really exposed to was not known.  
15 How ETS changes in the room air had not been  
16 studied. The fundamental work that the companies  
17 did, the evidence will show, was necessary to  
18 understand what ETS is and what it isn't and to  
19 determine whether it does or does not hurt people.

20 A large part of the early work that the  
21 companies did was to develop methods to study ETS,  
22 to see how it changes and how much of it a person  
23 really breathes. In addition to their own work on  
24 ETS chemistry, the evidence will show that the  
25 companies funded other research. For example, the

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1 evidence will show that they funded scientists at  
2 Oak Ridge National Laboratories to prepare a book  
3 about ETS. It's entitled The Chemistry of  
4 Environmental Tobacco Smoke: Composition and  
5 Measurement, and it was published by Lewis  
6 Publishers, Inc., in Boca Raton, Florida. The book  
7 is the most complete book there is on ETS available  
8 today.

9 As I said, figuring out ETS chemistry was a  
10 major project. The mainstream smoke, what comes off  
11 the inhalant of a cigarette, has more than 4,000  
12 different components, but each of those 4,000 things  
13 are there in tiny trace amounts.

14 Sidestream smoke, what comes off the lit end  
15 of a cigarette, is even more difficult to collect  
16 and analyze. And ETS, which is a combination of  
17 exhaled mainstream smoke, not the same as what  
18 someone inhales, but exhales, you see it also  
19 changes when people breathe it in and exhale it, so  
20 ETS is a combination of exhaled mainstream smoke and  
21 aged and diluted sidestream smoke.

22 An important point. As sidestream comes  
23 into the air off the end of a cigarette, it ages.  
24 It spreads out, and it's diluted by the air. And  
25 that process changes it. It changes the chemical

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1 reactions that are going on.

2 In fact, the evidence will show that ETS is  
3 thousands of times more dilute, more spread out than  
4 mainstream smoke. It is like mainstream smoke in  
5 the sense that the scientists will tell you, it has  
6 two phases: A vapor phase and what's called a  
7 particulate phase.

8 You're going to hear about those two phases  
9 of ETS and the fact that the things in them are  
10 different from the same two phases in mainstream  
11 smoke. You'll also hear other important  
12 differences, which means that being around ETS is  
13 not the same as smoking.

14 The evidence will be that there are physical  
15 and chemical differences between mainstream  
16 cigarette smoke and ETS. But ETS is thousands of  
17 times more dilute, that nonsmokers don't take in --  
18 don't breathe in ETS in the same way that smokers  
19 inhale the cigarette, that nonsmokers don't  
20 retain -- don't keep in their lungs or in their body  
21 ETS the same way smokers maintain mainstream smoke  
22 and that nonsmokers retain significantly less  
23 effects than the mainstream smokers inhale of smoke.  
24 In other words, there are huge differences in dose  
25 between breathing in ETS and smoking.

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1           And what the evidence will show is that  
2 exposure to ETS in real-world environments is very  
3 different from cigarette smoking. The evidence will  
4 show and the experts will tell you, because it's  
5 very different, it's not proper to draw conclusions  
6 about ETS exposures based on information or  
7 assumptions about active cigarette smoking.

8           Now, the evidence will tell you as the  
9 companies' work on ETS began, one of the key  
10 questions the researchers faced was: How do you  
11 measure it? It's a mixture of thousands of  
12 components, many of which are in just trace amounts.  
13 So what the company researchers did is they figured  
14 out how to use tracers or markers to measure ETS.

15           To be useful, a marker has to tell you  
16 accurately how much ETS is in the air. And what  
17 they're trying to do is figure out something that is  
18 in ETS that they can identify and collect and  
19 measure that will fairly and accurately tell you all  
20 about ETS and how much is in the air.

21           For quite awhile, a lot of scientists  
22 thought that nicotine was a good marker for ETS, but  
23 in late 1985, company scientists determined that  
24 nicotine was almost entirely in the ETS vapor phase,  
25 just the opposite of where ETS is in mainstream

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1 smoke. And what this discovery meant is that the  
2 researchers would have to develop a different marker  
3 for the ETS particulate phase, which is what many  
4 scientists wanted to study.

5 The discovery about nicotine was presented  
6 by company scientists to the National Academy of  
7 Sciences in 1986. The scientists did then discover  
8 a chemical called solanesol that could be measured  
9 and used to determine exposure to ETS particles.  
10 But with that, researchers had to rely on what's  
11 called RSP, respirable suspended particles. RSP is  
12 a marker for the ETS particulate phase, but the  
13 problem with it, it's not unique to ETS. RSP can  
14 come from other places, so when you measure RSP in  
15 the air, what the evidence will show you is you're  
16 not necessarily just measuring ETS.

17 RSP isn't a specific chemical. In fact,  
18 it's a measure of breathable particles in the air,  
19 and they can come from ETS. The scientists will  
20 also tell you they can come from people, from pets  
21 and from the outdoor air.

22 The companies not only focused on markers  
23 and how you can measure ETS chemically, but they  
24 also focused on how to measure it in real-world  
25 places, not just the laboratory. They started by

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1 hiring an outside company to develop a sampling  
2 device, a piece of equipment that you could put in  
3 some place and actually measure ETS. And that  
4 company produced a large suitcase-sized sampling  
5 device that was very heavy and difficult to move  
6 around.

7 So one of the defendants developed a  
8 different stationary device that was a little bit  
9 more movable, but during the first tests of this  
10 device what the scientists noticed is that people  
11 changed the way they smoked around it, because they  
12 noticed it and they saw what it was doing, so they  
13 changed their habits. And the scientists were  
14 worried that that would produce bad measurements,  
15 that it wouldn't produce accurate results. So they  
16 worked on a different approach.

17 By early 1986, the company scientists had  
18 developed a briefcase-sized sampling system that  
19 could successfully measure ETS. And this portable  
20 sampler was used by the companies and by us, our  
21 researchers, to learn about ETS levels in offices,  
22 restaurants, buses and aircraft cabins. It  
23 permitted indoor air sampling that could determine  
24 realistically how much ETS there is in real-world  
25 situations.

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1           The evidence will also show that the company  
2 supported a survey of indoor air quality in four  
3 major U.S. cities to determine how much ETS there is  
4 in offices, in restaurants and other places. And  
5 what this survey found is that the amount of ETS in  
6 the air is really very small.

7           Next, in 1992, the companies developed a  
8 different and better way to measure ETS with a  
9 lighter device that people could actually wear on  
10 their clothing, that they could attach or pin on  
11 their clothing, and it would enable them to measure  
12 exactly how much ETS was in the breathable area of  
13 an individual so that they could really figure out  
14 how much ETS a person would be breathing in a  
15 real-world environment.

16           These personal sampling systems were used to  
17 figure out actual ETS exposures in a variety of  
18 environments, and using these very technologies, Oak  
19 Ridge Technologies performed a nation-wide survey in  
20 16 cities. In each city, the evidence will show,  
21 100 nonsmokers were asked to wear these personal  
22 devices to measure how much ETS they were around at  
23 work and outside of work.

24           The final study results were published in  
25 1996. They produced the most reliable, actual

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1 measurements of ETS exposure in both the home and  
2 the work place.

3 Reynolds and the other companies also  
4 studied ETS in tests that are called bioassays.  
5 They're tests to determine whether ETS exposure  
6 might produce harmful results in animals. Bioassays  
7 are like a screening test. If a particular  
8 substance like ETS doesn't produce positive results  
9 in the assay, it won't be harmful at exposure levels  
10 similar to those testing.

11 You will hear about Dr. Chris Coggins, a  
12 scientist who now works for Lorillard who  
13 coordinated two different animal studies on ETS that  
14 were done by company scientists.

15 In these studies, groups of rats were  
16 exposed to different levels of ETS. Let me just  
17 make a point here about these animals studies. What  
18 the evidence will show you is they exposed the rats  
19 in Dr. Coggins' studies to three different levels of  
20 ETS. The first level was intended to be just like  
21 the real world. And the second level was supposed  
22 to be an extreme exposure, very high. And the third  
23 level are what they called -- I'll have to look at  
24 my notes to spell it -- exaggerated.

25 Now, what the evidence will show is that the

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1 exaggerated levels were hundreds of times more than  
2 people are actually exposed to in the real world.

3       What the important evidence will be is that  
4 whether it was real-world exposures, or whether it  
5 was extreme exposures, or whether it was exaggerated  
6 exposures, hundreds of times real world, ETS  
7 produced no harmful effects in animals. ETS, in  
8 each of these levels, produced no harmful effects in  
9 animals.

10       Now, Reynolds wasn't alone in doing that  
11 work. For a period of several years, scientists at  
12 Philip Morris have studied whether ETS is harmful.  
13 They've done similar animal tests that have produced  
14 similar results.

15       More importantly, the work done by Philip  
16 Morris was aimed at getting important information  
17 needed to do what's called a lifetime inhalation  
18 study. Now, in a lifetime study, rats will be  
19 exposed to ETS for a large part of their lives. And  
20 Philip Morris' lifetime exposure study has been  
21 underway for six months, and at the conclusion of  
22 that experiment, the evidence will tell you, Philip  
23 Morris will produce the data for publication.

24       The companies will tell you they've taken  
25 the ETS issue seriously from an early point in the

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1 debate. They have taken a responsible approach to  
2 their work to understand ETS, what it is and what it  
3 isn't and how much of it is present in real-world  
4 environments and whether it can hurt people.  
5 They've made tremendous contributions to the science  
6 and to the understanding about ETS, and the evidence  
7 will tell you, their work is continuing.

8 Let me now turn to the evidence about the  
9 claimed defects of being around ETS by human beings.  
10 And the first point I want to make is a point that  
11 Mr. Hardy made and that I referred to earlier, and  
12 that is that there will be toxicologists who will  
13 testify.

14 Toxicology is a science that involves the  
15 study of whether exposures to something is or is not  
16 harmful. And the most fundamental principle of  
17 toxicology, a principle that the experts will tell  
18 you that has been around for 400 years, is that the  
19 dose makes the poison. The dose makes the poison.

20 And what they'll tell you is that everything  
21 in large quantities is a poison. The experts will  
22 tell you that the water we drink, the oxygen we  
23 breathe, the vitamins and medicines we take to  
24 promote good health, all, if taken in too much, can  
25 become a poison. But the flip side is, we all get,

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1 all of us, the experts will tell you, exposure to  
2 small doses of toxic chemicals without any harm or  
3 danger.

4 The evidence will show you that this basic  
5 principle means that you cannot tell the health  
6 effects of something that shows up in very small  
7 doses by looking at what happens in very big doses.  
8 But in order to understand the toxicological effects  
9 of something which shows up in small doses, you'd  
10 have to look at what happens with those small doses  
11 in the real world. There will be no disagreement.  
12 The evidence will tell you conclusively the dose  
13 makes the poison.

14 So to say whether the amount of ETS on  
15 airplanes cause disease, the evidence will show that  
16 the first step is to determine how much ETS flight  
17 attendants were around during the time they spent on  
18 planes when smoking was allowed.

19 The evidence will show you that the ETS that  
20 they were around was minimal, much less than someone  
21 gets living with a smoker.

22 Flight attendant exposures are determined by  
23 three things: First, how much ETS was in the air in  
24 different sections of airplanes that the airlines  
25 designated for smoking and nonsmoking. Second, how

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1 much time flight attendants spent in the different  
2 sections of the airplane when passengers were  
3 smoking. And, third, how much air the flight  
4 attendants breathed in when working in sections of  
5 the airplane when passengers were smoking.

6 Now, that much of it seems pretty easy, but  
7 the evidence, I'll be honest on this issue, is  
8 pretty technical.

9 To begin with, the evidence will show you  
10 that the amount of any specific part of ETS in the  
11 air is so low for most constituents, it's never even  
12 been measured in real-world environments. In other  
13 words, many of these so-called carcinogens the  
14 plaintiffs talk about are present in ETS in very,  
15 very low levels that have never even been measured.

16 For the specifics things that can be  
17 measured, the amounts are so small they're described  
18 in technical terms that I alluded to. The evidence  
19 will show that they're measured in micrograms per  
20 cubic meter. And it's micrograms per cubic meter,  
21 because we're talking about something that is  
22 dispersed in the air. And so what you have to  
23 figure out is how much of this is in a volume or a  
24 space. So they measure it in terms of, for example,  
25 micrograms per cubic meter. And a microgram is a

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1 millionth of a gram.

2           Our experts will tell you that the way to  
3 think about that is to think about a microgram per  
4 cubic meter as being like emptying two packs of  
5 Sweet 'N Low in an olympic-sized swimming pool.  
6 They'll tell you that a nanogram is a billionth of a  
7 gram, and that the way you can think about a  
8 nanogram in a cubic meter is it's like taking one  
9 pack of Sweet 'N Low, putting it in a space filled  
10 with water as big as the Miami Orange Bowl. That's  
11 a nanogram per cubic meter.

12           These terms, microgram, nanogram and some of  
13 the other terms you'll hear about, are really not  
14 informative in trying to deal with ETS exposures and  
15 talk about them. And company scientists have  
16 attempted to develop other ways to talk about how  
17 much ETS is in the air. One of the approaches that  
18 they'll tell you about is to describe ETS in terms  
19 of cigarette equivalents. The cigarette equivalent  
20 is an approximation of the amount of ETS breathed in  
21 by a nonsmoker described in terms of numbers of  
22 cigarettes.

23           Now, remember, a pack of cigarettes contains  
24 20 cigarettes. And someone who smokes two packs a  
25 day smokes more than 14,000 cigarettes in a year. A

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1 smoker of one pack a day smokes more than seven  
2 thousand cigarettes a day [sic]. Someone who smokes  
3 as few as five cigarettes in a day smokes more than  
4 1,800 cigarettes in a year.

5 Also, keep in mind that the evidence will  
6 tell you that breathing ETS is not like smoking a  
7 cigarette. In addition, the evidence will tell you  
8 that actual ETS exposures depends upon several  
9 things: The amount of ETS in the air, the  
10 ventilation, the length of time a person is in the  
11 area where people are smoking, the number of people  
12 smoking and other things.

13 Well, based on all that, how much cigarette  
14 equivalents did flight attendants get? The evidence  
15 on that may be startling to you at first, but based  
16 upon accurate measurements of ETS on airplanes, the  
17 time spent in planes by flight attendants with  
18 passengers who were smoking, the evidence will show  
19 you the exposures were tiny. Using either nicotine  
20 as a marker or RSP as a marker, as a basis for  
21 comparison, the evidence will show you that an  
22 average flight attendant would have breathed less  
23 than five cigarette equivalents in a year.

24 Remember that a-pack-a-day smoker smokes  
25 7,000 cigarettes a year. Someone who smokes five

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1 cigarettes a day smokes more than 1,800 cigarettes a  
2 year. And what the evidence will show you is that  
3 the exposure of a flight attendant was less than  
4 five cigarette equivalents in a year.

5 The dose makes the poison. The evidence  
6 will show that five cigarettes a year does not cause  
7 disease. Now, why were flight attendant exposures  
8 so low? Well, first the evidence will tell you the  
9 airlines have very good ventilation. The air in an  
10 airplane gathers exchange much more often than the  
11 air in a typical home.

12 A typical home ventilation system exchanges  
13 the air once an hour. The evidence will tell you  
14 that the ventilation system on an airplane exchanges  
15 the air 20 times in an hour. Contrary to what the  
16 plaintiff said yesterday, the evidence will tell you  
17 that the system continuously brings in air from the  
18 outside.

19 It's called a one-pass ventilation system,  
20 and up till 1980, virtually all planes had these  
21 systems. Even by 1985, 75 percent of planes used  
22 one-pass ventilation.

23 Second, flight attendants spend far less  
24 time actually on airplanes than other people spend  
25 in their homes and work places. A typical flight

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1 attendant may actually have worked 70 hours per  
2 month. However, only about 50 of those hours every  
3 month -- just over 12 hours in a week -- just over  
4 12 hours in a week -- were spent in the cabin when  
5 passengers were smoking. The average flight  
6 attendant spent less than 600 hours per year on  
7 planes during a time when passengers were allowed to  
8 smoke.

9 In contrast, the evidence will tell you that  
10 a person living in a home with a smoker, seven days  
11 a week, 365 days a year, year in, year out, spends  
12 ten times that or 6,000 hours on average in their  
13 home. And a person working in a work-place  
14 environment, the evidence will tell you, spends as  
15 much as 2,000 hours or more than three times what an  
16 airline flight attendant does in their work place.

17 The third point about this exposure is that  
18 the ventilation and filtration systems on airplanes  
19 limit flight attendant exposures. What the evidence  
20 will tell you is that except for the first row or  
21 two, airplane ventilation systems removed ETS from  
22 the air before there was any real movement from the  
23 smoking section to the non-smoking section, so once  
24 you got to the non-smoking section, ETS dropped  
25 significantly.

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1           The first one or two rows in the smoking  
2 section we'll refer to as the border section. Once  
3 the flight attendant left the border section, they  
4 had very little ETS exposures.

5           Also, when airlines began recirculating air  
6 to save money on fuel in the 1980s, they installed  
7 very efficient filters that removed almost all  
8 particle matter from the recirculated area.

9           For all of these reasons, for all of the  
10 ventilation, the way the plane is ventilated, the  
11 times people spent, these are why ETS exposures for  
12 flight attendants are really very tiny, very small.

13           The dose makes the poison.

14           THE COURT: You don't have to repeat  
15 that statement, Counsel. That's argument.

16           MR. WHITING: Thank you, Your Honor.

17           There's another way to look at flight  
18 attendants' exposures that help put it in context.  
19 Because of the time the flight attendants spent in  
20 airplanes, so much time less than spent at home, the  
21 evidence will show you from experts' comparisons,  
22 and what the evidence will show you is if you look  
23 at a flight attendant on a yearly basis as a unit of  
24 one, and then if you look at exposures in a  
25 residence or a work place, the exposures in a

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1 residence are three to ten times what a flight  
2 attendant's yearly exposure was, and the exposure in  
3 the average work place is two to three times what a  
4 flight attendant's exposure was. So the evidence  
5 will show you that when you compare exposures of  
6 flight attendants to other environments, they,  
7 again, are dramatically lower.

8 Now, you might ask yourself if ETS is a  
9 mixture of trace amounts of things thought to be  
10 carcinogenic, doesn't that mean that ETS has to be  
11 the cause of cancer? The evidence will be no.  
12 Contrary to what the plaintiffs said yesterday,  
13 merely calling something a carcinogen does not mean  
14 that each and every type of exposure to that  
15 substance will cause cancer. It just doesn't work  
16 that way.

17 What the experts will tell you is that  
18 carcinogenic is not an absolute term; it's a  
19 relative term. And the word carcinogenic does not,  
20 by definition, mean that it causes cancer in humans.

21 The evidence will tell you that a few  
22 chemicals contained in ETS have been labeled  
23 carcinogenic, but only under very specific  
24 circumstances. And what the experts will tell you  
25 is that you've got to look at several different

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1 things. First, what type of animal has the chemical  
2 produced cancer in, and how relevant are those  
3 animals to humans.

4 What the scientists will tell you is that  
5 different kinds of species of animals develop  
6 different kinds of diseases in different ways. And  
7 if you're not testing a substance on an animal that  
8 has meaning to the human being, the test may be  
9 meaningless. So the question is what kind of  
10 exposure and what kind of animal.

11 The next issue is what type of cancer was  
12 developed. Was it lung cancer or some other type?  
13 And the experts will tell you that the next issue to  
14 be concerned about is how was the animal exposed?  
15 Was the animal breathing the chemical the way people  
16 breathe ETS, or was material being concentrated in  
17 very high concentrations and painted on the animal's  
18 back, or was it being surgically implanted in the  
19 animal's lung in a way that would never happen in  
20 the real world?

21 And most important, what the experts will  
22 tell you is that you have to see how much was the  
23 animal exposed to. Did the animal receive an amount  
24 of the chemical similar to what a person might  
25 actually get for breathing ETS, or did it receive

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1 tens of thousands of times as much of the chemical  
2 as might be found in ETS.

3 The evidence will show you that these  
4 criteria are established among scientists. The  
5 evidence will also tell you that when the criteria  
6 is applied to any of the so-called carcinogens of  
7 ETS, the results are clear. The evidence will be  
8 that not a single constituent, not one, has been  
9 shown to cause lung cancer when an amount similar to  
10 the amount of ETS is breathed by test animals.

11 Does even exposure to one molecule of a  
12 cancer-causing agent or carcinogen cause cancer?  
13 Again, the evidence will tell you, the answer is no.  
14 Indeed, what the experts will tell you is that we  
15 live each day of our lives in what they call a sea  
16 of carcinogens. We don't all get cancer. Our  
17 bodies have repair mechanisms. These repair  
18 mechanisms are why we all survive on a planet where  
19 we're all exposed to carcinogens and other toxins in  
20 our daily lives each day.

21 What the toxicologists will tell you is the  
22 water we drink contains many different carcinogens,  
23 the air that we breathe contains more than 100  
24 carcinogens, and perhaps one of the biggest sources  
25 of carcinogens in our lives is the food we eat.

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1           For example, what the experts will tell you  
2 is that in a single cup of coffee, there are more  
3 than 1,000 chemicals, including many carcinogens.  
4 They'll tell you that in a single grilled hamburger,  
5 there's a hundred times as much benzpyrene as a  
6 flight attendant was exposed to in a whole year of  
7 flying on planes when the airlines permitted  
8 smoking.

9           The evidence will tell you that how much is  
10 very important. If this weren't true, all of us  
11 would have cancer, because all of us are exposed to  
12 carcinogenic substances every day.

13          The evidence will also show you that the  
14 animal studies have always been considered by  
15 scientists to be very important in determining  
16 whether cancer causes harmful effects in people.  
17 Animal studies are important because they allow the  
18 scientists to control the experimental conditions of  
19 a study.

20          Scientists can divide the animals into  
21 groups that are almost exactly alike except for the  
22 substance they're trying to test. They can  
23 precisely control what and how much the animals are  
24 exposed to, and they can carefully examine the  
25 animals to determine the precise effects on them.

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1           Animal studies tell us whether a substance  
2 might be harmful in real-world doses. Now, the EPA  
3 report the plaintiffs talk about does make  
4 references to animal studies, but interestingly  
5 enough, the EPA doesn't talk about animal studies on  
6 ETS. It talks about animal studies of concentrated  
7 smoke painted on skin or animal studies of  
8 concentrated smoke implanted in the lungs of  
9 animals. The EPA just ignored animal studies which  
10 have been done and published on breathing ETS.

11           But the evidence will show you that to  
12 understand possible health effects of the level of  
13 ETS exposures experienced in the real world, it's  
14 necessary to examine the effects of similar ETS  
15 levels on animals. Without looking at real-world  
16 doses, you can't determine whether those levels  
17 caused any disease.

18           As I mentioned to you, the studies done by  
19 Dr. Coggins and other experts regarding ETS  
20 exposures have demonstrated that even at exaggerated  
21 levels, even at levels hundreds of times the real  
22 world, animals studies have produced no harmful  
23 effects in animals breathing ETS.

24           Your Honor, I have probably about another  
25 hour. Do you want to take a break?

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1 THE COURT: Well, I was hoping we would  
2 get finished with yours before we went to lunch.  
3 Can you finish before 1:00?

4 MR. WHITING: I'll give it my best  
5 shot. I'm not sure I can do that, Your Honor.

6 THE COURT: All right. If you're going  
7 to go into another subject, maybe it would be a good  
8 idea.

9 MR. WHITING: It's a good breaking  
10 point.

11 THE COURT: I'll tell you what we will  
12 do. We'll have lunch. It's ten after 12:00. You  
13 get back here at 1:30. It will give you an extra  
14 few minutes.

15 Do not discuss the case with anybody, again.  
16 Do not think about it, reach any conclusions or  
17 decisions.

18 Again, you're free to go anywhere you wish  
19 for lunch, and be with anyone. Please stay with the  
20 bailiff until you get out of the building here so  
21 that you won't run into any conflicts outside in the  
22 hallway, in the elevators.

23 We'll see you back here. Come to the second  
24 floor, directly to the second floor jury room.  
25 We'll meet you down there at 1:30.

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1 All right, folks. You're excused.

2 Leave the clipboards on your seat.

3 (Thereupon, the Jury was excused from the  
4 courtroom.)

5 THE COURT: Any matters that need to be  
6 discussed at this time?

7 MS. LUTHER: Your Honor, we agreed to  
8 bring that matter to the defendant's attention. If  
9 we need to, we'll discuss it.

10 THE COURT: You call can be seated.

11 I did want to discuss with RJR, you'd  
12 indicated you're going to have two arguments of RJR?

13 MR. WHITING: No, no. Your Honor, I  
14 meant Mr. Hardy and my argument. Two arguments.  
15 That's all.

16 THE COURT: Is Mr. Furr going to do  
17 argument in this case?

18 MR. FURR: No.

19 MR. WHITING: He'd like to, Your Honor.

20 THE COURT: You folks need to talk  
21 among yourselves about something. We will meet  
22 before we get back after lunch.

23 MR. COFER: Your Honor, we're going to  
24 need to take up the list of exhibits that are going  
25 to be used by Dr. Richmond. The plaintiffs gave me

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1 a list of 160 exhibits that they plan to use  
2 tomorrow. It's the first time I heard about them.  
3 They weren't mentioned at his deposition. It's in  
4 violation of the 48-hour rule, and it's kind of  
5 late, so I'd like to take that up.

6 MS. ROSENBLATT: Well, Your Honor --

7 THE COURT: Is it on the exhibit list?

8 MS. ROSENBLATT: Yes. It's a  
9 compilation of the Tobacco Institute documents and  
10 advertising. It's basically what we showed in  
11 opening.

12 THE COURT: We'll discuss that after  
13 lunch and take a look at it. All right. We'll be  
14 in recess.

15 (Whereupon a luncheon recess was taken at  
16 12:15 o'clock p.m.)  
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